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Supreme Court of the United States

OCTOBER TERM, 1952, No. 262

CALMAR STEAMSHIP CORPORATION,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

LIBRARY
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

October Term, 1952, No.....

Calmar Steamship Corporation,

Petitioner,

against

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Calmar Steamship Corporation, prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit dated May 12, 1952, in the above entitled case.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported. It appears at pages 802-804 of the record.

The decision of the United States District Court for the Southern District of New York is reported in 103 F. Supp. 243, and appears at pages 700-756 of the record.

Statement of the Matter Involved.

This is a suit against the United States under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920 (41 Stat. 525) 46 U. S. C. 741 and 742, set forth in Appendix I.

The libel herein was filed in the United States District Court for the Southern District of New York in accordance with the ruling of this Court in *Matson Navigation Co. v. United States*, (1932) 284 U. S. 352.

The causes of action are founded on the time charter of SS. *Portmar* between petitioner, owner, and the United States Maritime Commission, charterer, dated as of November 21, 1941, and relate to damage sustained by the *Portmar* by enemy aerial attack in the Timor Sea on February 16, 1942, and at Port Darwin, Australia on February 19, 1942.

The Vessel

The *Portmar* was an American cargo vessel classed in Lloyd's Register of Shipping. The *Portmar* was a general cargo carrier and had never been used as anything else since petitioner acquired the vessel in 1930. Libelant's Exhibit 1, R. 580; R. 160.

The *Portmar* was owned, operated, manned and supplied by petitioner, and was navigated by merchant officers and seamen hired and paid by petitioner. R. 128, 133, 154. *Charter*, Art. 2.01 and 2.05 (see Appendix II), R. 32, 25.

The Charter

As of November 21, 1941 petitioner chartered the *Portmar* to the United States Maritime Commission by a time charter for one round voyage to the Philippine Islands and return. Said charter contained, among others, the provisions set forth in Appendix II.

The Voyage

Pursuant to Article 1.01 of said charter, the *Portmar* sailed on November 28, 1941 from San Francisco for the Philippine Islands, with cargo of high octane gasoline in drums, military equipment and supplies shipped by the Government as "lawful merchandise", under Article 2.01 of said charter.

After the Japanese attack on Pearl Harbor December 7, 1941, the *Portmar* was diverted by United States Naval orders to Suva in the Fiji Islands, there to take orders from the British Naval Authorities. The British naval authority at Suva ordered the *Portmar* to Sydney, Australia, there to report to the Australian Naval Control. After arrival at Sydney the *Portmar* moved, always under sovereign military orders, between various ports on the eastern and northern coasts of Australia.

While so engaged, the *Portmar* sustained slight damage by Japanese aerial attack on February 16, 1942 in the Timor Sea; and on February 19, 1942 at Port Darwin, Australia she was so heavily damaged by Japanese aerial attack that the Master was obliged to beach her to prevent her from sinking in the deep water of the harbor.

The United States military authorities in Australia later arranged for salvage and towage of the vessel to Brisbane, Australia.

The United States requisitioned title to the vessel in damaged condition on November 17, 1942 at Brisbane, Australia. The *Portmar* was never restored to her former condition but was patched up and used for military purposes. She was later sunk by a Japanese torpedo.

The Proceedings Below

The libel herein states the following causes of action against the United States:

1. Charter hire pursuant to Articles 1.02 and 2.04 of said charter, R. 19-20, 23-25, from date of the disaster, February 19, 1942 to date of the requisition, November 17, 1942.

2. Indemnity pursuant to Article 2.17 of said charter, R. 35, as to any amount not recoverable from the war risk underwriters of the *Portmar* by reason of termination or vitiation of the war risk insurance of the vessel or any additional premium allowed to said underwriters.

3. Indemnity pursuant to Article 2.11 of said charter, R. 28-29, as to any damage or loss arising from compliance with orders or directions of the United States or its agents given pursuant to Article 2.11 of said charter or any article of said charter.

Except insofar as it is maintained for the benefit of the subrogated war risk underwriters, it is alternative to the action instituted by petitioner against the war risk underwriters of the *Portmar* in the United States District Court for the Southern District of New York entitled *Calmar Steamship Corporation, Libelant,* v. *Sydney Keith Scott, et al., Respondents,* Ad.-133-332. That suit claimed recovery for a constructive total loss in the full amount of the insurance, $860,000.00, and in addition for sue and labor charges and salvage award paid, with interest, and in the alternative for a partial loss.

The cases were tried together and decided by the District Court on May 25, 1951 in one opinion. R. 700-756. The District Court directed that the appeals proceed on a single printed record. R. 789. The appeals in both cases were decided on May 12, 1952 in one opinion. R. 792-804.

The Decisions Below

The District Court held that the Court had jurisdiction over all claims arising out of the charter of the *Portmar* under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920, 46 U. S. C. 741 and 742; that the *Portmar* was operated "for the United States"; that the *Portmar* was not owned by the United States; that the charter provided that the vessel should be operated by the owner and not by the charterer; that the charter was not a demise of the vessel; that the *Portmar* was employed as a merchant vessel, being privately owned and operated for the profit of the owner, in charge of a Master and crew selected by the owner and responsible to it alone; and that the nature of the cargo did not change the merchant character of the vessel. R. 742-744.

The District Court further held, however, that the intent of the charter was that the United States was not to be liable for any loss covered by the war risk insurance provided for in the charter; that the *Portmar* did not sustain any loss or damage from any cause which would render the United States liable therefor under the charter; and accordingly, because of recovery allowed to petitioner against the war risk underwriters, disallowed the libel herein except as to petitioner's claim in the case of victualling supercargoes pursuant to Article 1.02 of said charter in the sum of $238.50 for which recovery was allowed (R. 744, 756).

The District Court allowed full recovery to the petitioner in the action against the war risk underwriters above mentioned, and in that action the war risk underwriters appealed.

The United States appealed herein on the point of jurisdiction, R. 782-784. Petitioner also appealed (R. 778) but its

assignments of error were only provisional (R. 779-781) in order to protect its position in the event that the decision of the District Court in the action against the war risk underwriters should not be in all respects affirmed.

In the present case the United States Court of Appeals held, as did the District Court, that the *Portmar* was operated "for the United States" as provided by Section 1 of the Suits in Admiralty Act, 1920, (R. 742, 803) but reversed the decision below, holding that the District Court had not any jurisdiction of the causes of action alleged in the libel because the *Portmar* was not "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742, by reason of the nature of the cargo shipped at San Francisco under the charter.

In the action against the war risk underwriters the United States Court of Appeals reversed the decision below and directed that the libel be dismissed, holding that the war risk insurance had terminated before the loss occurred.

Thus Petitioner was deprived of recovery against the war risk underwriters and was also denied on jurisdictional grounds any alternative recovery in the District Court against the United States in the present suit.*

Jurisdiction

The jurisdiction of this Court to review this case on a writ of certiorari is provided by Title 28, United States Code, Section 1254.

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* On January 15, 1948 Calmar Steamship Corporation instituted suit now pending against the United States in the Court of Claims, No. 48509. The first three causes of action of the petition in that suit parallel those alleged in the libel in the present case because the Government's answer herein raised the issue of jurisdiction. R. 18, 44.

Questions Presented*

1. Whether the United States District Court for the Southern District of New York has jurisdiction under Sections 1 and 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 741 and 742, in a suit against the United States on a claim arising from the operation for the United States, under a time charter for the carriage of "lawful merchandise" for hire, of a privately owned, manned and operated American cargo vessel, carrying military equipment and supplies shipped as "lawful merchandise" by the United States under said charter.

2. Whether a privately owned, manned and operated American cargo vessel, operated for the United States under a time charter for the carriage of "lawful merchandise" for hire, is deprived of her character as a merchant vessel, so as not to be "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742, because the Government elects to ship on said vessel military equipment and supplies as "lawful merchandise" under said charter.

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* If this petition is granted, Petitioner reserves for submission to this Court the following questions on the merits:

(a) Whether the United States is liable to Calmar Steamship Corporation for charter hire from February 19, 1942 to noon, Australia time, November 17, 1942, the date on which the United States requisitioned title to the *Portmar;*

(b) Whether the United States is liable to indemnify Calmar Steamship Corporation pursuant to Article 2.17 of said charter (see Appendix II) against any loss not recoverable from the war risk underwriters by reason of (1) vitiation or termination of the war risk insurance before the loss or (2) additional premium allowed to the war risk underwriters.

(c) Whether the United States is liable to indemnify Calmar Steamship Corporation pursuant to Article 2.11 of said charter, (see Appendix II) against any liability or loss arising from compliance with orders given by the United States or its representative even though such orders were given as a souvereign.

Reasons for Allowance of Writ of Certiorari.

1. The decision of the United States Court of Appeals herein affects an important question of Federal law, which has not been, but should be, settled by this Court, as to the meaning of "employed as a merchant vessel" as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742.

2. The decision of the United States Court of Appeals herein affects an important question of Federal law, which has not been, but should be, settled by this Court, in that it excludes from the jurisdiction of the District Court under the Suits in Admiralty Act, 1920, any cause of action against the United States which may arise under a time or voyage charter to the United States or any of its agencies, of a privately owned, manned and operated American cargo vessel, if such vessel carries military equipment and supplies shipped as lawful merchandise under such charter.

3. The proper forum for a suit against the United States on a maritime cause of action as presented herein, should be determined by this Court.

4. The decision of the United States Court of Appeals herein is in conflict with applicable decisions of this Court in which it has been held that the Suits in Admiralty Act, 1920, 46 U. S. C. 741 et seq. was designed by Congress to apply to one of the two classes of vessels, i.e. those of the character of merchant vessels, as distinguished from public vessels, with respect to suits maintainable against the United States on maritime causes of action. *James Shewan & Sons, Inc.* v. *United States* (1924), 266 U. S. 108, 111-112; *Eastern Transportation Co.* v. *United States* (1927), 272 U. S. 675, 691-692.

5. The decision of the United States Court of Appeals herein is in conflict with the intent of Congress shown by Committee reports, hearings and Congressional proceedings relating to, and preceding the passage of, the Act.

6. The United States Court of Appeals herein erred in holding, without prior authority, that a privately owned, manned and operated vessel was not "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, because it carried military equipment and supplies, notwithstanding such cargo was shipped by the Government as "lawful merchandise" under a time charter of said vessel to the United States providing for the carriage of "lawful merchandise". The cases cited in the opinion below as authority for that holding involve only vessels owned, either legally or *pro hac vice*, by the United States, and operated by the United States, and it does not appear that said vessels carried merchandise for hire.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

Dated New York, August 5, 1952.

CALMAR STEAMSHIP CORPORATION

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HEREIN AFFECTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The questions presented turn on the interpretation of the words "employed as a merchant vessel" as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742. They affect the basis of jurisdiction of the United States District Courts in Admiralty as conferred by that statute with respect to maritime causes of action against the United States.

But what is far more important, as a matter of national security, they involve the issue whether privately owned vessels, while committed by time charter to the service of the United States and carrying full Government cargoes for hire under such charters, are to be made subject to arrest by process *in rem*. Such vessels are certainly not entitled to the sovereign immunity enjoyed by "public vessels". Therefore, if they are not protected by the Suits in Admiralty Act and rendered immune from arrest by Section 1 of that Act, they are open to restraint and delay by legal process, a result which is directly contrary to the intent of Congress and the declared purposes of the Suits in Admiralty Act.

There can be no serious question as to the importance of the questions involved.

In *Eastern Transportation Company* v. *United States*, (1927) 272 U. S. 675 the question turned on the construction of the phrase here involved, under different facts. At page 692 of the opinion, Mr. Chief Justice Taft referred to the question as "the important question now before us".

The whole field in which privately owned American cargo vessels are operated for the United States under time charter or voyage charter to the United States, carrying goods, merchandise or military supplies and equipment, for compensation in the form of charter hire under a time charter or voyage freight under a voyage charter, is excluded from the jurisdiction of the United States District Courts by the decision below.

There is a broad possibility of claims against the United States arising under such charters. To close the District Courts to all such claims on the ground that such vessels are not "employed as merchant vessels", gives rise to a question of considerable importance.

It has been strongly indicated by this Court in *Matson Navigation Company* v. *United States* (1932), 284 U. S. 352, that suits against the United States on maritime causes of action with respect to vessels operated for the United States and employed as merchant vessels belong in the District Courts, not in the Court of Claims, because of the exclusive jurisdiction of the District Courts under the Suits in Admiralty Act, 1920. See also *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Brothers & Company*, (1928) 276 U. S. 202, 214; *Johnson* v. *U. S. Shipping Board Emergency Fleet Corporation, et al*, (1930) 280 U. S. 320, 326-327.

The effect of the decision below will be to exclude from the District Courts all maritime claims arising under time charters and voyage charters to the United States of vessels

operated for the United States carying Government stores and supplies as "lawful merchandise" for hire, and forcing such claims into the Court of Claims if the amount involved exceeds $10,000, the limit of jurisdiction of the District Courts in civil actions under the Tucker Act, 28 U. S. C. 1346.

It is therefore submitted that the question as to jurisdiction of the District Court of the present suit under the Suits in Admiralty Act, 1920 is an important question which should receive the consideration of this Court.*

II.

THE UNITED STATES COURT OF APPEALS ERRED IN HOLDING THAT THE *Portmar* WAS NOT "EMPLOYED AS A MERCHANT VESSEL" WITHIN THE MEANING OF THOSE WORDS AS FOUND IN SECTION 2 OF THE SUITS IN ADMIRALTY ACT, 1920, 46 U. S. C. 742.

The decision below was founded on the fact that the vessel loaded at San Francisco, and carried on the voyage, military equipment and supplies. R. 802-803.

But the Court below failed to take account of the fact that said military equipment and supplies were loaded pur-

* There is also a serious question, which does not affect petitioner's pending suits, but which will affect other litigants in suits against the United States on similar facts. The Court of Claims no longer has jurisdiction of any claim as to which any suit against the United States is pending in any other Court. 28 U. S. C. 1500, in effect September 1, 1948. In *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352, as here, suits were maintained in both the District Court and in the Court of Claims. Suits against the United States on the same cause of action in both District Court and Court of Claims may no longer be maintained. The litigant must choose at his peril, especially in view of the two year suit limit of Section 5 of the Suits in Admiralty Act, 46 U. S. C. 745.

suant to a charter for the carriage of a full cargo of "lawful merchandise" for hire. *Charter*, Articles 1.02, 2.01, 2.03, R. 19-20, 22-23 (*post*, Appendix II).

Prior decisions of this Court.

The cases cited as authority by the Court of Appeals below (R. 803) did not involve "the same point" as stated by the Court, but were on entirely different facts. The vessels in all those cases were either owned outright by the United States, or as to which the United States was owner *pro hac vice* by demise charter. In each case the vessel was manned by a crew hired and paid by the United States. None of those cases involved Government supplies carried for hire.

So far as we are aware there is no appellate decision, prior to the decision below, holding that a privately owned, privately manned and privately operated vessel is not "employed as a merchant vessel" because she carries military equipment and supplies as "lawful merchandise" for hire. There is, however, a District Court decision which has construed the similar words of Section 9 of the Shipping Act 1916 "employed solely as a merchant vessel", on facts similar to those here involved. In that case it was held that carriage of Government goods does not deprive the vessel of her merchant character. *The Nishmaha* (D. Ore. 1920) 263 Fed. 959.

The decision below, excluding the present case from the jurisdiction of the District Court under the Suits in Admiralty Act, 1920, is demonstrably unsound under the authorities.

It is clear from [redacted] decisions of this Court and the provisions of the Public Vessels Act, 1925, that the broad plan which underlies the Suits in Admiralty Act, 1920 and

the Public Vessels Act, 1925, 46 U. S. C. 781, 782, is to confer jurisdiction on the District Courts over maritime causes of action against the United States as to public or merchant vessels operated by or for the United States.

James Shewan & Sons, Inc. v. *United States,* (1924) 266 U. S. 108;

Eastern Transportation Company v. *United States et al,* (1927) 272 U. S. 675;

United States Shipping Board Emergency Fleet Corporation v. *Rosenberg Brothers & Company,* (1928) 276 U. S. 202, 214;

Johnson v. *U. S. Shipping Board Emergency Fleet Corporation, et al,* (1930) 280 U. S. 320, 326-327.

In the Suits in Admiralty Act, jurisdiction is conferred as to all maritime causes of action. In the Public Vessels Act, jurisdiction is conferred as to damage caused by a public vessel, and for compensation for towage and salvage rendered to a public vessel.

The decisions show that all such vessels are divided into two classes. (1) public vessels and (2) vessels employed as merchant vessels.

In the first class lie all vessels owned by the United States legally or *pro hac vice,* manned and operated by the United States, not carrying cargoes or passengers for hire. In the second class lie all vessels engaged in the business of carriage of cargo or passengers for hire, even though owned and operated by the United States.*

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* Vessels owned by the United States, either outright or as owner *pro hac vice* under demise charter, and operated for Government account carrying Government munitions or goods, not for compensation by payment of freight or hire, are public vessels. *The*

In *James Shewan & Sons, Inc.* v. *United States*, (1924) 266 U. S. 108, the question was as to jurisdiction under the Suits in Admiralty Act in a case involving a vessel which was owned by the United States but which had last been employed in the merchant service. At the time the libel was filed, the vessel was in the laid-up fleet of the Shipping Board, carrying neither crew or cargo. The District Court dismissed the libel for lack of jurisdiction on the ground that the vessel at the time the libel was filed was not "employed as a merchant vessel". This Court, on direct appeal, reversed the decree, holding that the words "provided that such vessel is employed as a merchant vessel" as found in Section 2 of the Act, "may reasonably and more liberally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as such. Thus construed, § 2 gives the District Court jurisdiction in such a case as this."

In reaching that conclusion and in discussing the terms of Section 9 of the Shipping Act, 1916 (to which the Court of Appeals herein also referred), this Court said, 266 U. S. at pages 111-113 (italics ours):

> "We do not find anything in the Act of 1916 which would prevent its liberal construction to enable one who had repaired a vessel engaged solely as a merchant vessel for the United States from proceeding against that vessel *in rem* under the Act

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Western Maid, (1922) 257 U. S. 419; *U. S. Grain Corporation* v. *Philips*, (1922) 261 U. S. 106.

Vessels even though owned by the United States which are engaged in the carriage of goods for hire or which last have been, or are next to be, in that service, are "employed as merchant vessels". *The Lake Monroe*, (1919) 250 U. S. 246; *James Shewan & Son Inc.* v. *United States*, (1924) 266 U. S. 108; *Eastern Transportation Company* v. *United States, et al.*, (1927) 272 U. S. 675; *Adams, et al.* v. *United States*, (D. Mass. 1922) 281 Fed. 895; *The Jeanette Skinner*, (DMd. 1919) 258 Fed. 768.

of 1916, even though, after the repairs had been made upon her as a commercial vessel, she was subsequently laid up, if she had not then acquired character as a public vessel. So we do not think that the decision in *The Lake Monroe*, 250 U. S. 246, would have been different had she thus been laid up after she had injured the libelant's vessel in that case. Obviously, under the Act of 1916, liability to suit of a vessel owned or controlled by the United States as a merchant vessel depended primarily, not upon the time when the suit was to be brought and the vessel was to be seized, *but upon her character as one solely engaged in merchant service* when the transaction occurred out of which the liability grew. * * * The date of the suit would be important only in the application of a statute of limitation or a *change in character of the vessel from that of a merchant vessel to public vessel,* * * * *The important line between immunity from judicial seizure of government vessels under the Act of 1916 was between public vessels and those engaged in merchant service. The mere laying up of a vessel engaged in the latter service would not change its character,* unless the Government did something affirmative to make it a public vessel. * * * In view of the relation of the Act of 1920 to the Act of 1916, unless the words of the proviso of §2 of the Act of 1920 make any other construction unreasonable, the mere laying up of the vessel before suit brought under the act should not prevent a libel *in personam* against the United States for a claim which under the Act of 1916 might be enforced against the vessel itself. *The words of the proviso may reasonably and more liberally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as such.* * * *"*

Thus the test is as to the *character* of the vessel as between two categories, that of public vessels and that of vessels employed as merchant vessels.

Later, in *Eastern Transportation Company* v. *United States et al.* (1927), 272 U. S. 675, this Court held that the Suits in Admiralty Act conferred a right of action against the United States in admiralty for damage to a barge and her cargo by collision with a sunken Government vessel which before her loss was last owned and used by the United States solely as a merchant vessel. The Government contended that the vessel which caused the damage was a wreck and was not at the time employed as a merchant vessel; thus that the District Court had not any jurisdiction under the Act.

The District Court dismissed the libel for lack of jurisdiction. On direct appeal to this Court the decree was reversed. In holding that the Suits in Admiralty Act, 1920 conferred jurisdiction under the circumstances above stated, this Court said at 272 U. S. at page 692 (italics ours):

> "* * * What the statute means by saying 'employed as a merchant vessel,' is that the vessel shall *belong to that class as distinguished from one employed in the governmental service*—not necessarily that it shall be actively thus employed at the time of the collision. *Shewan & Sons* v. *United States*, supra. * * *"

Thus this Court stated the two categories, merchant vessels and public vessels.

This division of the types of vessels into two classes was followed in *United States* v. *Caffey*, (2 Cir. 1944) 141 F. 2d. 69; *State of Maine* v. *United States*, (1 Cir. 1943) 134 F. 2d 574; *Olavarria & Co.* v. *United States*, (SDNY 1944) 56 F. Supp. 758, 763; *The Jeanette Skinner*, (DMd. 1919) 258 Fed. 768; *Adams et al.* v. *United States* (DMass. 1922) 28 Fed. 895.

The Government argued before the Court of Appeals below that the *Portmar* could not be classified as a public

vessel of the United States, and that even though she were, the suit could not be maintained under the Public Vessels Act, 1925, 46 USC. 781 because that Act confers only a remedy "for damages caused by a public vessel * * * and for compensation for towage and salvage services * * *" rendered to a public vessel. Thus the Government contended that the *Portmar* was neither a public vessel, nor employed as a merchant vessel. We argued that under the decisions there is no middle ground. The Court of Appeals however, failing to appreciate that the two categories above mentioned exhaust the field, made the following statement in the course of the decision, R. 803:

> "We cannot understand what is the significance of the fact that the *'Portmar'* was not a 'public vessel' and that no suit would lie under the 'Public Vessels Act,' * * * unless the argument be that, if there be no relief under either the Suits in Admiralty Act or the Public Vessels Act, we should assume that a suit will lie for the *casus omissus*. * * *"

No such argument was made by us. The Court below did not appreciate that the exclusion of the *Portmar* from the category of public vessels necessarily put her in the category of vessels employed as merchant vessels. The decisions already cited do not allow any theory that there is a twilight zone between the two, and that as to such unclassified vessels, operated "for the United States," Congress has provided no jurisdiction in the District Court for suits against the United States on maritime causes of action.

The intent of Congress.

The genesis of the Suits in Admiralty Act was the ruling of this Court in *The Lake Monroe* (1919), 250 U. S. 246

under Section 9 of the Shipping Act 1916, which related to vessels "employed solely as merchant vessels".

The report from the Committee on Commerce, to accompany S. 3076, the Senate bill which as amended was later enacted as the Suits in Admiralty Act, 1920, refers to the decision in *The Lake Monroe* and points out that this Court held in that case that if a vessel owned by the United States carries cargo under a charter or other agreement for a stipulated rate of freight or hire, her service is purely commercial, and that such a vessel, even though Government owned, is subject to arrest under process *in rem*, and the ordinary liability of a merchant vessel, by reason of the terms of Section 9 of the Shipping Act of 1916. Senate report No. 223, 66th Congress, 1st Session, concludes with the following:

> "The result of this is to subject the United States to unnecessary expense and its vessels to great delays. This bill meets the situation by providing specifically for suits *in personam* against the United States and expressly prohibits suits *in rem* against its merchant vessels."

The deliberations which preceded the passage of the Suits in Admiralty Act, 1920, contained unmistakable indications that the intent was to confer immunity from arrest on, and jurisdiction on the District Courts as to, all vessels operated for the United States, which are not public vessels. The meaning of the words "employed as a merchant vessel" as laid down in the decisions in this Court, already discussed, was exactly in line with the intent of Congress in the passage of the Act.

During the hearings before the House Committee on the Judiciary, 66th Congress, 1st Session, November 13,

1919 at page 45, Charles F. Dutch, Admiralty Counsel to the Shipping Board, said that the bill (S. 3076) "* * * is confined to actions where the vessel was under an actual commitment for the carriage of goods or passengers for hire."

On January 17, 1920, on the floor of the House, Representative Andrew J. Volstead, Chairman of the House Committee on the Judiciary, when the House had S. 3076 under consideration, stated the purposes of the proposed measure in colloquy with Representative Walsh of Massachusetts and Representative White of Maine as follows (*Cong. Rec.* Vol. 59, Part 2, page 1680) (Italics ours):

> "Mr. Walsh. Will the gentleman yield for a question?
>
> Mr. Volstead. I will.
>
> Mr. Walsh. The bill as reported by the committee restricts this right to sue for damages resulting from collision or otherwise to damages received as the result of the operation of merchant ships by the United States Government. It does not include vessels of war or other vessels owned by different departments of the Government.
>
> Mr. Volstead. *No; it simply covers merchant vessels. The committee had extensive hearings, because a great many parties insisted that we ought to extend it so as to embrace naval vessels, so called, and other vessels of the Government not engaged in commerce.* Of course, we have a very large number of those vessels. My understanding is that perhaps some effort will be made upon the floor to include those, but we will try to cross that bridge when we reach it. The Committee on the Judiciary concluded *that it ought not in this bill include anything but merchant ships.* This is in the nature of an emergency measure. I believe that if we are to consider the other phase of this shipping matter, we ought to

do it in a separate measure and ought to consider it carefully, because I can see there may be many complications we ought to take care of, such as those which necessarily must arise during war and from conditions that do not affect the ordinary merchant ships."

Later, on January 19, 1920, the following discussion between Representative Bankhead of Alabama and Representative Walsh of Massachusetts occurred on the floor of the House (*Cong. Rec.*, Vol. 59, Part 2, page 1751) (Italics ours):

"Mr. Bankhead. It seems to me, taking into consideration the fact that section 2 only relates to one specific phase of the general purpose in view, the gentlemen's proposition is not good that this bill relates to only one class of merchant vessels.

Mr. Walsh. The gentleman stopped too soon in the reading of the title.

Mr. Bankhead. In what particular?

Mr. Walsh. He said, 'authorizing suits against the United States in admiralty.' It also says:

Suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Now, it is not limited to just suits in admiralty. It declares immunity and also relates to stipulations as to the release of various public vessels from arrest. *But throughout the entire bill, Mr. Chairman, from first line to the last, the clear intent and purpose is to restrict it to merchant vessels, vessels employed in carrying cargo for hire, or intended to be so employed. There is nothing in here that can be construed to include battleships, submarines, Navy tugs, or any other of the vast number of vessels afloat which are owned by the Government.*"

On February 23, 1920 the Managers of the Committee of Conference submitted a Conference Report on S. 3076 which set forth the bill in the form in which it was finally enacted. In report, No. 669, 66th Congress, 2nd Session, the Managers on the part of the House made a statement which contained among, other things, the following:

> "1. Section 1 of the House amendment has been rewritten. As amended, it eliminates the provision declaring all vessels of the United States to be public vessels, and excludes the Panama Railway Co. from the operation of the bill.
>
> 2. In section 2 the words 'or intended to be employed in the carriage of cargoes or of passengers for hire' have been stricken out, and the words 'as a merchant vessel or as a tugboat operated by such corporation.' The effect of this change is to exclude from the scope of the bill certain public vessels not employed as merchant vessels, but that occasionally carry persons and property for hire, and to make certain that tugboats employed as auxiliaries to the merchant fleet are made subject to the proposed act."*

Thus was shown the importance of the carriage of property for hire as determining the scope and jurisdiction of the District Courts under the proposed bill.

The deliberations in Congress show beyond question that the Congressional intent never included any category or classification other than public vessels of the United States on one hand, and all vessels employed as merchant vessels on the other. It is clearly shown that the public vessels of the United States refer to "battleships, sub-

---

* The words "substituted therefor" or words to that effect, were apparently omitted after the word "corporation" in the fifth line of this paragraph.

marines, Navy tugs, or any other of the vast number of vessels afloat which are owned by the Government"; and that the words "employed as a merchant vessel" referred to "vessels employed in carrying cargo for hire, or intended to be so employed." *Cong. Rec. Vol. 59, Part 2,* page 1751, quoted *ante,* p. 23. Compare *The Nishmaha* (D. Ore. 1920) 263 Fed. 959 as to the meaning of the similar words in Section 9 of the Shipping Act, 1916.

There is no indication whatever of Congressional intent that a cargo vessel usually employed in the carriage of cargo for hire would lose her character as a merchant vessel if she should be engaged in the carriage of Government cargo for hire. Her merchant character is fixed by her employment in the earning of money for her owner by the carriage of cargo for hire. There is no indication of Congressional intent that the nature of the cargo which she carries *for hire* would make the slightest difference in her status or character for the purposes of the Act.

After all, the cargo on board the *Portmar* was Government-owned, and it was vital in the public interest that such cargo reach its destination without interference. If the *Portmar* was subject to arrest while so engaged, the carriage of that cargo might have been seriously interrupted. It was in such a situation, among others, that the Suits in Admiralty Act was designed to confer immunity of the vessel from arrest. The vessel was being operated "for the United States", being committed to the carriage of Government goods and stores, and it was just as important in the public interest that the *Portmar* should be immune from arrest while so engaged, as that her cargo should be immune from arrest, as it clearly was. What good would immunity of the cargo accomplish if the vessel

It is clearly within the scope of the Act, and of the intent of Congress in the passage of the Act, that a privately owned vessel while engaged in the business of carrying a full cargo of Government goods for hire and thus "employed as a merchant vessel" should be immune from arrest, and that jurisdiction of a claim against the United States, as here presented, should lie in the District Court. *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352.

Conclusion.

THE QUESTIONS STATED IN THE PETITION SHOULD BE SETTLED BY THIS COURT.

A writ of certiorari should be issued in accordance with the prayer of the foregoing petition.

Dated New York, August 5, 1952.

Respectfully submitted,

EDWIN S. MURPHY,
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New York 5, N. Y.

IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Of Counsel.

APPENDIX I.

Pertinent provisions of the Suits in Admiralty Act, March 9, 1920, 41 Stat. 525, Secs. 1 and 2 (46 U. S. C. 741-742):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found * * *"

APPENDIX H.

Pertinent Clauses of the time charter of SS. Portmar, Exhibit A, Attached to Libel, R. 18-38.

Contract MCc-1915

TIME CHARTER.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

WITNESSETH:

WHEREAS:

I. The Charterer has determined, pursuant to the provisions of an Act of Congress approved June 6, 1941 (Public Law 101—77th Congress), that vessels in addition to those otherwise available are necessary for transportation of foreign commerce of the United States, or of commodities essential to the national defense;

II. The Charterer deems the terms and conditions hereof and the period of this Charter and the restrictions herein

contained to be necessary or desirable for the protection of the public interest and the rate of hire herein provided to be fair and reasonable.

NOW, THEREFORE, the Owner and Charterer agree:

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. * * *

* * * * *

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

* * * *

PART II.

ARTICLE 2.01. The Vessel shall be placed at the disposal of the Charterer at the port of delivery at such safe ready dock, wharf or place as the Charterer may direct. Any time lost by the Vessel awaiting the availability of such dock, wharf or place shall count as time on hire. The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and, as far as due diligence can make it

so, tight, staunch, strong and in every way fitted for service, having water ballast, winches and power sufficient to run all the winches at one and the same time and a Master and a full complement of officers and crew for a vessel of her tonnage, and due diligence shall be exercised by the Owner to maintain her in such state during the currency of this Charter. The Vessel shall be employed in carrying lawful merchandise, including petroleum or its products in proper containers, between safe ports or places, in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct.

ARTICLE 2.02. The whole reach and burthen of the Vessel's holds, decks, and usual places of loading (but not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only space proper and sufficient in the opinion of the Master for Vessel's officers and crew, Master's cabin, tackle, apparel, furniture, provisions, fresh water, stores and fuel.

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the casualty last occurring shall be the time when hire ceases. Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time . . .

ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or * * *

Provided, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

* * *

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; or * * *

* * *

* * * Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for.

ARTICLE 2.05. The Owner shall provide and pay for: all provisions; all galley, cabin, deck and engine room stores; fuel for cooking; wages of, and consular, shipping and discharging fees and other expenses pertaining to, the Master, Officers and Crew (except as herein otherwise provided); 25% of all fresh water used by the Vessel if a steamer, or 75% if a motorship, all water ballast; and insurance (except as herein otherwise provided) on the Vessel.

ARTICLE 2.06. The Charterer shall (except as herein otherwise provided) provide and pay for: all fuel (except for cooking) 75% of all fresh water (except water ballast) if the Vessel is a steamer, or 25% if a motorship; all port charges, pilotages, light, dock, canal and other dues, stevedoring, agencies, commissions, reasonable ballast, (except water ballast, and the cost of loading and discharging it); tug assistance and boating where incurred for the Charterer's business, and all other charges and expenses whatsoever except those which, by the terms of this Charter, are specifically made payable by the Owner. * * *

* * *

ARTICLE 2.10. The Charterer shall furnish the Master from time to time with all requisite instructions and sailing directions, in writing, * * *

ARTICLE 2.11. Subject always to the direction of the Charterer, the Master shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with Ship's crew and boats; and shall use due diligence in caring for and ventilating the cargo. The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages; and Charterer shall load, stow, trim and discharge the cargo at its expense under the supervision of the Master, who is to sign bills of lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts. The Master, officers and crew of the Vessel in supervising loading, stowing, trimming, tallying and discharging, shall be deemed the agents of the Charterer, except in so far as such supervision pertains to the safety of the Vessel. * * *

The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter.

* * *

ARTICLE 2.16. The Vessel, her Master and Owner, shall not unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: * * * fire, unless caused by the personal design or neglect of the Owner; * * * stranding, or peril, danger or accident of the sea or other navigable waters; * * * or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her master or Owner, nor the Charterer, shall unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, * * * arrest or restraint of princes, rulers or people, * * * No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter.

ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured * * *

The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

* * *

ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer.

* * *

ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; * * *

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Supreme Court of the United States

OCTOBER TERM, 1952, No. 262.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1952, No. 262

CALMAR STEAMSHIP CORPORATION,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 197 F. 2d 795 and appears at pages 802-804 of the record.

The decision of the United States District Court for the Southern District of New York is reported in 103 F. Supp. 243, and appears at pages 700-756 of the record.

JURISDICTION.

This Court issued writ of certiorari on October 20, 1952.

The jurisdiction of this Court rests upon the provisions of Title 28, United States Code, Section 1254.

Questions Presented*

1. Whether the United States District Court for the Southern District of New York has jurisdiction under Sections 1 and 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 741 and 742, in a suit against the United States on a claim arising from the operation for the United States, under a time charter for the carriage of "lawful merchandise" for hire, of a privately owned, manned and operated

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* In the petition for writ of certiorari herein, petitioner reserved for submission to this Court certain questions on which the Court of Appeals did not make any decision, because the libel was dismissed for lack of jurisdiction. (R. 779-781).

Said reserved questions are as follows:

(a) Whether the respondent is liable to petitioner for charter hire from February 19, 1942 to noon, Australia time, November 17, 1942, the date on which the respondent requisitioned title to the *Portmar*;

(b) Whether the respondent is liable to indemnify petitioner pursuant to Article 2.17 of said charter (see Appendix II) against any loss not recoverable from the war risk underwriters by reason of (1) vitiation or termination of the war risk insurance before the loss or (2) additional premium allowed to the war risk underwriters.

(c) Whether the respondent is liable to indemnify petitioner pursuant to Article 2.11 of said charter, (see Appendix II) against any liability or loss arising from compliance with orders given by the respondent or its representative even though such orders were given as a sovereign.

Question (a) is discussed in the Second Point hereof.

Question (b) is discussed in the Third Point hereof.

Question (c) is discussed in the Fourth Point hereof.

If this Court reinstates the decision and decree of the District Court (R. 700-756, 765-768) in *Calmar Steamship Corporation* v. *Sydney Keith Scott, et al.*, October Term 1952, No. 303, then it will not be necessary for this Court to deal with the above reserved questions (a) and (b), because in (a) no further charter hire would then be recoverable by petitioner; and in (b) there would be no basis for indemnity. In (c), however, the indemnity is recoverable, regardless of the insurance, and for the benefit of subrogated underwriters.

American cargo vessel, carrying military equipment and supplies shipped as "lawful merchandise" by the United States under said charter.

2. Whether a privately owned, manned and operated American cargo vessel, operated for the United States under a time charter for the carriage of "lawful merchandise" for hire, is deprived of her character as a merchant vessel, so as not to be "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742, because the Government elects to ship on said vessel military equipment and supplies as "lawful merchandise" under said charter.

Statement of the Case

This is a suit against the United States under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920 (41 Stat. 525) 46 U. S. C. 741 and 742, set forth in Appendix I.

The libel herein was filed in the United States District Court for the Southern District of New York in accordance with the ruling of this Court in *Matson Navigation Co.* v. *United States*, (1932) 284 U. S. 352.

The causes of action are founded on the time charter of SS. *Portmar* between petitioner, owner, and the United States Maritime Commission, charterer, dated as of November 21, 1941, and relate to damage sustained by the *Portmar* by enemy aerial attack in the Timor Sea on February 16, 1942, and at Port Darwin, Australia on February 19, 1942.

The Vessel.

The *Portmar* was an American cargo vessel classed in Lloyd's Register of Shipping. The *Portmar* was a general

cargo carrier and had never been used as anything else since petitioner acquired the vessel in 1930. Libelant's Exhibit 1, R. 580; R. 160.

The *Portmar* was owned, operated, manned and supplied by petitioner, and was navigated by merchant officers and seamen hired and paid by petitioner. R. 128, 133, 154. *Charter,* Art. 2.01 and 2.05 (see Appendix II), R. 22, 25.

The Charter.

As of November 21, 1941 petitioner chartered the *Portmar* to the United States Maritime Commission by a time charter for one round voyage to the Philippine Islands and return. Said charter contained, among others, the provisions set forth in Appendix II.

The Voyage.

Pursuant to Article 1.01 of said charter, the *Portmar* sailed on November 28, 1941 from San Francisco for the Philippine Islands, with cargo of high octane gasoline in drums, military equipment and supplies shipped by the Government as "lawful merchandise", under Article 2.01 of said charter.

After the Japanese attack on Pearl Harbor December 7, 1941, the *Portmar* was diverted by United States Naval orders to Suva in the Fiji Islands, there to take orders from the British Naval Authorities. The British naval authority at Suva ordered the *Portmar* to Sydney, Australia, there to report to the Australian Naval Control. After arrival at Sydney the *Portmar* moved, always under sovereign military orders, between various ports on the eastern and northern coasts of Australia.

While so engaged, the *Portmar* sustained slight damage by Japanese aerial attack on February 16, 1942 in the

Timor Sea; and on February 19, 1942 at Port Darwin, Australia she was so heavily damaged by Japanese aerial attack that the Master was obliged to beach her to prevent her from sinking in the deep water of the harbor.

The United States military authorities in Australia, with the cooperation of the Australian government, later arranged for salvage and towage of the vessel to Brisbane, Australia.

The United States requisitioned title to the vessel in damaged condition on November 17, 1942 at Brisbane, Australia. R. 624-625, 738. The *Portmar* was never restored to her former condition but was patched up and used for military purposes. R. 738-739. She was later sunk by a Japanese torpedo. R. 739.

The Proceedings Below.

The libel herein states the following causes of action against the United States, R. 5-18:

1. Charter hire pursuant to Articles 1.02 and 2.04 of said charter, R. 19-20, 23-25, from date of the disaster, February 19, 1942 to date of the requisition of title, November 17, 1942.

2. Indemnity pursuant to Article 2.17 of said charter, R. 35, as to any amount not recoverable from the war risk underwriters of the *Portmar* by reason of termination or vitiation of the war risk insurance of the vessel or any additional premium allowed to said underwriters.

3. Indemnity pursuant to Article 2.11 of said charter, R. 28-29, as to any liability or loss arising from compliance with orders or directions of the United States or its agents given pursuant to Article 2.11 of said charter or any article of said charter.

Except insofar as this suit is for the benefit of the subrogated war risk underwriters, it is alternative to the action instituted by petitioner against the war risk underwriters of the *Portmar* in the United States District Court for the Southern District of New York entitled *Calmar Steamship Corporation, Libelant,* v. *Sydney Keith Scott, et al., Respondents,* now pending in this court, October Term 1952, No. 303. That suit claimed recovery for a constructive total loss in the full amount of the insurance, $860,000.00, and in addition for sue and labor charges and salvage award paid, with interest, and in the alternative for a partial loss.

The Decisions Below.

The District Court held that the Court had jurisdiction over all claims arising out of the charter of the *Portmar* under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920, 46 U. S. C. 741 and 742; that the *Portmar* was operated "for the United States"; that the *Portmar* was not owned by the United States; that the charter provided that the vessel should be operated by the owner and not by the charterer; that the charter was not a demise of the vessel; that the *Portmar* was employed as a merchant vessel, being privately owned and operated for the profit of the owner, in charge of a Master and crew selected by the owner and responsible to it alone; and that the nature of the cargo did not change the merchant character of the vessel. R. 742-744.

The District Court further held herein that the intent of the charter was that the United States was not to be liable for any loss covered by the war risk insurance provided for in the charter; that the *Portmar* did not sustain any loss or damage from any cause which would render

the United States liable therefor under the charter; and accordingly, because of recovery allowed to petitioner against the war risk underwriters, disallowed the libel herein except as to petitioner's claim in the case of victualling supercargoes pursuant to Article 1.02 of said charter in the sum of $238.50 for which recovery was allowed (R. 744, 756).

The District Court allowed full recovery to the petitioner in the action against the war risk underwriters *Decree,* R. 765-768, and the war risk underwriters appealed.

The United States appealed herein on the point of jurisdiction, R. 782-784. Petitioner also appealed (R. 778) but its assignments of error were only provisional (R. 779-781) in order to protect its position in the event that the decision of the District Court in the action against the war risk underwriters should not be in all respects affirmed.

In the present case the United States Court of Appeals held, as did the District Court, that the *Portmar* was operated "for the United States" as provided by Section 1 of the Suits in Admiralty Act, 1920, (R. 742, 803) but reversed the decision below, holding that the District Court had not any jurisdiction of the causes of action alleged in the libel because the *Portmar* was not "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742, by reason of the nature of the cargo shipped at San Francisco under the charter.

In the action against the war risk underwriters the United States Court of Appeals reversed the decision below and directed that the libel be dismissed, holding that the war risk insurance had terminated before the loss occurred. R. 792-802.

Thus Petitioner was deprived of recovery against the war risk underwriters and was also denied on jurisdictional

grounds any alternative recovery in the District Court against the United States in the present suit.*

Specification of Errors

1: The United States Court of Appeals erred—

1. In holding that the *Portmar*, privately owned, privately manned and operated, was not employed as a merchant vessel during the period here involved, because she carried a cargo of Government munitions and war material.

2. In holding that the District Court did not have jurisdiction of the libel herein under Sections 1 and 2 of the Suits in Admiralty Act, 1920.

Summary of Argument

1. *The Portmar was "employed as a merchant vessel" within the meaning of those words as used in Section 2 of the Suits in Admiralty Act, 1920.*

Prior decisions of this Court have established two categories for all vessels in the service of the United States, (1) public vessels and (2) vessels employed as merchant vessels.

In the first class lie all vessels owned by the United States legally or *pro hac vice*, and manned and operated by the United States, not carrying cargoes or passengers for hire.

In the second class lie all vessels, even though owned and operated by the United States, engaged in the business of carrying cargo or passengers for hire.

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* On January 15, 1948 petitioner instituted suit now pending against the United States in the Court of Claims, No. 48509. The first three causes of action of the petition in that suit parallel those alleged in the libel in the present case, because the Government's answer herein raised the issue of jurisdiction. R. 18, 44.

James Shewan & Sons, Inc. v. *United States* (1924), 266 U. S. 108;
Eastern Transportation Company v. *United States, et al.* (1927), 272 U. S. 675.

The intent of Congress was that the term "employed as a merchant vessel" as used in Section 2 of the Suits in Admiralty Act, 1920 would embrace all vessels except public vessels owned and operated by the United States, and that the distinction between a public vessel and a vessel employed as a merchant vessel, is the fact of carriage of persons or property for hire.

There is no indication of Congressional intent that a cargo vessel usually employed in the carriage of cargo for hire would lose her character as a merchant vessel if she should engage in the carriage of *government* cargo or personnel for hire. The merchant character of such a vessel is fixed by her employment in the earning of money for owner by the carriage of persons or cargo for hire, not by the nature of her passengers or cargo.

In the event that the vessel may carry a split cargo, part government property and part general commercial cargo, what would be the basis for determination of jurisdiction? It is obvious that the test adopted by the Court below as to the nature of the cargo would not serve in many cases and is, therefore, unsound because the test of jurisdiction should be definite and clear.

Accordingly, the test of jurisdiction of this case under Section 2 of the Suits in Admiralty Act, 1920 is whether at the material time the *Portmar*, privately owned and operated was engaged in the carriage of passengers or cargo for hire; not the kind of passengers or cargo which the vessel may have carried.

2. Petitioner is entitled to recover charter hire from the United States, if it should be held that the Portmar *was not a total loss, either actual or constructive, under the terms of the war risk insurance.*

The term "constructive total loss" as used in Article 2.03 of the charter means a constructive total loss under the war risk insurance policies which are specified in, and the form of which was prescribed, by Article 2.17 of the charter. The charter provides for continuance of the payment of charter hire if the vessel be out of service by reason of damage sustained due to enemy attack, unless the vessel shall be an actual total loss, or a constructive total loss within the provisions of the war risk insurance.

Petitioner performed all of its obligations under the charter. The *Portmar* sustained extensive damages by enemy attack on February 19, 1942. Petitioner was relieved from any liability for non-performance by the provisions of Article 2.16 of the charter. The *Portmar* was never physically abandoned by petitioner. Tender of abandonment to the underwriters for a constructive total loss is not physical abandonment of the vessel.

There was not any frustration of the *charter* of the *Portmar*, even though the voyage came to an end by constructive total loss of the vessel.

3. If the war risk insurance was terminated before the loss by reason of compliance by the Portmar *with orders issued by the United States as sovereign, then under the provisions of the last paragraph of Article 2.17 of the charter the United States is bound to indemnify petitioner to the extent of any loss which would otherwise have been covered by the war risk insurance.*

The rule stated by this Court in *Horowitz* v. *United States* (1925), 267 U. S. 458 and in *Froemming Bros., Inc.*

v. *United States* (1947), 108 Ct. Cl. 193 is limited to a situation in which the sovereign issued general orders affecting all persons, property or vessels.

Here the sovereign act was specific as to the *Portmar* alone and was therefore a breach of the express undertaking of the last paragraph of Article 2.17 of the charter. Under such circumstances the Government is as liable for breach of contract as any private citizen would be. *United States* v. *Bostwick* (1876), 94 U. S. 53, 69; *United States* v. *Peck* (and cross-action) (1880), 102 U. S. 64; see also *Sunswick Corp.* v. *United States* (1948), 109 Ct. Cl. 772.

The obligation of the United States to indemnify petitioner pursuant to the last paragraph of 2.17 of the charter extends to indemnity as to any amount allowed to the underwriters as an additional premium by way of set-off or otherwise under the Held Covered Clause.

4. The United States is liable pursuant to Article 2.11 of the charter to indemnify petitioner against any loss or liability arising from compliance with orders given by the United States either as charterer or as sovereign.

The last paragraph of Article 2.11 of the charter specifically provided for indemnity against the consequence of compliance with any orders or directions of the charterer "given pursuant to this Article or any other Article of this charter". Therefore the charter expressly provided for indemnity of petitioner from all consequences of compliance with any orders or directions of the United States either in its capacity of charterer or in its capacity of sovereign, the latter being explicitly provided for in Article 2.27.

Such indemnity is enforceable in favor of petitioner because even though the orders were given as sovereign,

they were specific military orders affecting the *Portmar* alone, not general orders affecting all parties or vessels similiarly situated and thus not within the rule of the *Horowitz* and *Froëmming* cases, *supra*.

FIRST POINT.

THE *Portmar* WAS "EMPLOYED AS A MERCHANT VESSEL" WITHIN THE MEANING OF THOSE WORDS AS FOUND IN SECTION 2 OF THE SUITS IN ADMIRALTY ACT, 1920, 46 U. S. C. 742.

The pertinent provisions of Sections 1 and 2 of the Suits in Admiralty Act, Appendix I, are as follows:

Section 1:

> "* * * no vessel * * * operated * * * for the United States * * * shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions * * *".

Section 2:

> "* * * in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel * * *".

The Court of Appeals below held that the *Portmar* was operated "for the United States", R. 803, but further held that the *Portmar* was not "employed as a merchant vessel" within the meaning of those words as found in Section 2

of the Suits in Admiralty Act, 1920, and that the District Court had not jurisdiction of the libel herein because the vessel loaded at San Francisco, and carried on the voyage, military equipment and supplies. R. 802-803.

But the Court below failed to take account of the fact that said military equipment and supplies were loaded pursuant to a charter for the carriage of a full cargo of "lawful merchandise" for hire. *Charter*, Articles 1.02, 2.01, 2.03, R. 19-20, 22-23 (*post*, Appendix II).

(a) *The decisions of this Court have established two categories, public vessels, and those employed as merchant vessels.*

The cases cited as authority by the Court of Appeals below (R. 803) (*U. S. Grain Corporation* v. *Phillips*, (1923) 261 U. S. 106; *Bradey* v. *United States*, (2 Cir. 1945) 151 F. 2d 742, Cert. Den. 326 U. S. 795; *United States* v. *City of New York*, (SDNY 1923) 8 F. 2d 270; *The Norman Bridge*, (SDNY 1922) 290 Fed. 575) did not involve "the same point" as stated by the Court, but were on entirely different facts. The vessels in all those cases were either owned outright by the United States, or as to which the United States was owner *pro hac vice* by demise charter. It does not appear that any of those cases involved the carriage of passengers or cargo for hire.

So far as we are aware there is no appellate decision, prior to the decision below, holding that a privately owned, privately manned and privately operated vessel is not "employed as a merchant vessel" because she carries military equipment and supplies as "lawful merchandise" for hire. There is, however, a District Court decision which has construed the similar words of Section 9 of the Shipping Act 1916 "employed solely as a merchant vessel", on facts similar to those here involved. In that case it was

held that carriage of Government goods does not deprive the vessel of her merchant character. *The Nishmaha* (D. Ore. 1920) 263 Fed. 959.

The decision below, excluding the present case from the jurisdiction of the District Court under the Suits in Admiralty Act, 1920, is demonstrably unsound under the authorities.

It is clear from the decisions of this Court and the provisions of the Public Vessels Act, 1925, (Appendix I) that the broad plan which underlies the Suits in Admiralty Act, 1920 and the Public Vessels Act, 1925, 46 U. S. C. 781, 782, is to confer jurisdiction on the District Courts over maritime causes of action against the United States as to public or merchant vessels operated by or for the United States.

James Shewan & Sons, Inc. v. *United States,* (1924) 266 U. S. 108;

Eastern Transportation Company v. *United States et al,* (1927) 272 U. S. 675;

United States Shipping Board Emergency Fleet Corporation v. *Rosenberg Brothers & Company,* (1928) 276 U. S. 202, 214;

Johnson v. *U. S. Shipping Board Emergency Fleet Corporation, et al,* (1930) 280 U. S. 320, 326-327.

In the Suits in Admiralty Act, jurisdiction is conferred as to all maritime causes of action. In the Public Vessels Act, jurisdiction is conferred as to damage caused by a public vessel, and for compensation for towage and salvage rendered to a public vessel.

The decisions show that for purposes of jurisdiction under the Suits in Admiralty Act 1920, and the Public Ves-

sels Act, 1925, all vessels are divided into two classes (1) public vessels and (2) vessels employed as merchant vessels.

In the first class lie all vessels owned by the United States legally or *pro hac vice,* manned and operated by the United States, not carrying cargoes or passengers for hire. In the second class lie all vessels engaged in the business of carriage of cargo or passengers for hire, even though owned and operated by the United States.*

In *James Shewan & Sons, Inc.* v. *United States,* (1924) 266 U. S. 108, the question was as to jurisdiction under the Suits in Admiralty Act in a case involving a vessel which was owned by the United States but which had last been employed in the merchant service. At the time the libel was filed, the vessel was in the laid-up fleet of the Shipping Board, carrying neither crew or cargo. The District Court dismissed the libel for lack of jurisdiction on the ground that the vessel at the time the libel was filed was not "employed as a merchant vessel". This Court, on direct appeal, reversed the decree, holding that the words "provided that such vessel is employed as a merchant vessel" as found in Section 2 of the Act, "may reasonably and more liberally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as

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*Vessels owned by the United States, either outright or as owner *pro hac vice* under demise charter, and operated for Government account carrying Government munitions or goods, not for compensation by payment of freight or hire, are public vessels. *The Western Maid,* (1922) 257 U. S. 419; *U. S. Grain Corporation* v. *Phillips,* 1923) 261 U. S. 106.

Vessels even though owned by the United States which are engaged in the carriage of goods for hire or which last have been, or are next to be, in that service, are "employed as merchant vessels". *The Lake Monroe,* (1919) 250 U. S. 246; *James Shewan & Son, Inc.* v. *United States,* (1924) 266 U. S. 108; *Eastern Transportation Company* v. *United States, et al.,* (1927) 272 U. S. 675; *Adams, et al.* v. *United States,* (D. Mass. 1922) 281 Fed. 895; *The Jeannette Skinner,* (DMd. 1919) 258 Fed. 768.

such. Thus construed, § 2 gives the District Court jurisdiction in such a case as this.'"*

Thus the test is as to the *character* of the vessel as between two categories, that of public vessels and that of vessels employed as merchant vessels.

Later, in *Eastern Transportation Company* v. *United States et al.* (1927), 272 U. S. 675, this Court held that the

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* In reaching that conclusion and in discussing the terms of Section 9 of the Shipping Act, 1916 (to which the Court of Appeals herein also referred), this Court said, 266 U. S., at pages 111-113 (italics ours):

> "We do not find anything in the Act of 1916 which would prevent its liberal construction to enable one who had repaired a vessel engaged solely as a merchant vessel for the United States from proceeding against that vessel *in rem* under the Act of 1916, even though, after the repairs had been made upon her as a commercial vessel, she was subsequently laid up, if she had not then acquired character as a public vessel. So we do not think that the decision in *The Lake Monroe*, 250 U. S. 246, would have been different had she thus been laid up after she had injured the libelant's vessel in that case. Obviously, under the Act of 1916, liability to suit of a vessel owned or controlled by the United States as a merchant vessel depended primarily, not upon the time when the suit was to be brought and the vessel was to be seized, *but upon her character as one solely engaged in merchant service* when the transaction occurred out of which the liability grew. * * * The date of the suit would be important only in the application of a statute of limitation or a *change in character of the vessel from that of a merchant vessel to public vessel*, * * * *The important line between immunity from judicial seizure of government vessels under the Act of 1916 was between public vessels and those engaged in merchant service. The mere laying up of a vessel engaged in the latter service would not change its character,* unless the Government did something affirmative to make it a public vessel. * * * In view of the relation of the Act of 1920 to the Act of 1916, unless the words of the proviso of § 2 of the Act of 1920 make any other construction unreasonable, the mere laying up of the vessel before suit brought under the act should not prevent a libel *in personam* against the United States for a claim which under the Act of 1916 might be enforced against the vessel itself. *The words of the proviso may reasonably and more liberally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as such.* * * *"

Suits in Admiralty Act conferred a right of action against the United States in admiralty for damage to a barge and her cargo by collision with a sunken Government vessel which before her loss was last owned and used by the United States solely as a merchant vessel. The Government contended that the vessel which caused the damage was a wreck and was not at the time employed as a merchant vessel; thus that the District Court had not any jurisdiction under the Act. The District Court had dismissed the libel for lack of jurisdiction. On direct appeal to this Court the decree was reversed. In holding that the Suits in Admiralty Act, 1920 conferred jurisdiction under the circumstances above stated, this Court said at 272 U. S. at page 692 (italics ours):

> "* * * What the statute means by saying 'employed as a merchant vessel,' is that the vessel shall *belong to that class as distinguished from one employed in the governmental service*—not necessarily that it shall be actively thus employed at the time of the collision. *Shewan & Sons* v. *United States*, supra. * * *"

Thus this Court stated the two categories, merchant vessels and public vessels.

This division of the types of vessels into two classes was followed in *United States* v. *Caffey*, (2 Cir. 1944) 141 F. 2d. 69; *State of Maine* v. *United States*, (1 Cir. 1943) 134 F. 2d 574; *Olavarria & Co.* v. *United States*, (SDAla. 1944) 56 F. Supp. 758, 763; *The Jeannette Skinner*, (DMd. 1919) 258 Fed. 768; *Adams et al.* v. *United States* (DMass. 1922) 281 Fed. 895.

The fallacy of the test of jurisdiction under the Suits in Admiralty Act, 1920, adopted by the Court below, viz. the nature of the cargo, R. 802-803, is apparent when it is

noted that a vessel may carry a split cargo, partly government munitions or property, and partly general commercial cargo. If the test of jurisdiction under the Suits in Admiralty Act, 1920, is as to the nature of the cargo carried, the difficulty of determining whether or not the District Court has jurisdiction is apparent. Would it be based on percentage? Or on which cargo was shipped first? The standard applied by the Court below may frequently prove utterly unworkable and the uncertainties of jurisdiction will only be multiplied. For that practical reason, this Court should reject the test of the nature of the cargo applied by the Court below, and should hold that the criterion of jurisdiction under the Suits in Admiralty Act, 1920, lies in the *character of the vessel,* rather than the nature of her passengers or cargo.

The Government argued before the Court of Appeals below that the *Portmar* could not be classified as a public vessel of the United States, and that even though she were, the suit could not be maintained under the Public Vessels Act, 1925, 46 USC. 781 because that Act confers only a remedy "for damages caused by a public vessel * * * and for compensation for towage and salvage services * * *" rendered to a public vessel. Thus the Government contended that the *Portmar* was neither a public vessel, nor employed as a merchant vessel. We argued that under the decisions there is no middle ground. The Court of Appeals however, failing to appreciate that the two categories above mentioned exhaust the field, made the following statement in the course of the decision, R. 803:

> "We cannot understand what is the significance of the fact that the '*Portmar*' was not a 'public vessel' and that no suit would lie under the 'Public Vessels Act,' * * * unless the argument be that, if

there be no relief under either the Suits in Admiralty Act or the Public Vessels Act, we should assume that a suit will lie for the *casus omissus.* * * *"

No such argument was made by us. The *Portmar* was obviously not a public vessel, because she was neither owned nor operated by the United States. The Court below did not appreciate that the exclusion of the *Portmar* from the category of public vessels necessarily put her in the category of vessels employed as merchant vessels. The decisions already cited do not allow any theory that there is a twilight zone between the two, and that as to such unclassified vessels, operated "for the United States," Congress has provided no jurisdiction in the District Court for suits against the United States on maritime causes of action.

(b) *The intent of Congress was that vessels carrying passengers or cargo for hire should be regarded as employed as merchant vessels.*

The genesis of the Suits in Admiralty Act was the ruling of this Court in *The Lake Monroe* (1919), 250 U. S. 246 under Section 9 of the Shipping Act 1916, which related to vessels "employed solely as merchant vessels".

The report from the Committee on Commerce, to accompany S. 3076, the Senate bill which as amended was later enacted as the Suits in Admiralty Act, 1920, refers to the decision in *The Lake Monroe* and points out that this Court held in that case that if a vessel owned by the United States carries cargo under a charter or other agreement for a stipulated rate of freight or hire, her service is purely commercial, and that such a vessel, even though Government owned, is subject to arrest under process *in rem*, and

the ordinary liability of a merchant vessel, by reason of the terms of Section 9 of the Shipping Act of 1916. Senate report No. 223, 66th Congress, 1st Session, concludes with the following:

> "The result of this is to subject the United States to unnecessary expense and its vessels to great delays. This bill meets the situation by providing specifically for suits *in personam* against the United States and expressly prohibits suits *in rem* against its merchant vessels."

The deliberations which preceded the passage of the Suits in Admiralty Act, 1920, contained unmistakable indications that the intent was to confer immunity from arrest on, and jurisdiction on the District Courts as to, all vessels operated for the United States, which are not public vessels. The meaning of the words "employed as a merchant vessel" as laid down in the decisions in this Court, already discussed, was exactly in line with the intent of Congress in the passage of the Act.

During the hearings before the House Committee on the Judiciary, 66th Congress, 1st Session, November 13, 1919 at page 45, Charles F. Dutch, Admiralty Counsel to the Shipping Board, said that the bill (S. 3076) "* * * is confined to actions where the vessel was under an actual commitment for the carriage of goods or passengers for hire."

On January 17, 1920, on the floor of the House, Representative Andrew J. Volstead, Chairman of the House Committee on the Judiciary, when the House had S. 3076 under consideration, stated the purposes of the proposed measure in colloquy with Representative Walsh of Massachusetts

and Representative White of Maine as quoted in the footnote.*

Later, on January 19, 1920, a discussion between Representative Bankhead of Alabama and Representative Walsh of Massachusetts occurred on the floor of the House as quoted in the footnote.**

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* Congressional Record, Vol. 59, Part 2, page 1680 (italics ours):

"Mr. Walsh. The bill as reported by the committee restricts this right to sue for damages resulting from collision or otherwise to damages received as the result of the operation of merchant ships by the United States Government. It does not include vessels of war or other vessels owned by different departments of the Government.

Mr. Volstead. *No; it simply covers merchant vessels. The committee had extensive hearings, because a great many parties insisted that we ought to extend it so as to embrace naval vessels, so called, and other vessels of the Government not engaged in commerce.* Of course, we have a very large number of those vessels. My understanding is that perhaps some effort will be made upon the floor to include those, but we will try to cross that bridge when we reach it. The Committee on the Judiciary concluded *that it ought not in this bill include anything but merchant ships.* This is in the nature of an emergency measure. I believe that if we are to consider the other phase of this shipping matter, we ought to do it in a separate measure and ought to consider it carefully, because I can see there may be many complications we ought to take care of, such as those which necessarily must arise during war and from conditions that do not affect the ordinary merchant ships."

** Congressional Record, Vol. 59, Part 2, page 1751 (italics ours):

"Mr. Bankhead. It seems to me, taking into consideration the fact that section 2 only relates to one specific phase of the general purpose in view, the gentlemen's proposition is not good that this bill relates to only one class of merchant vessels.

Mr. Walsh. The gentleman stopped too soon in the reading of the title.

Mr. Bankhead. In what particular?

Mr. Walsh. He said, 'authorizing suits against the United States in admiralty.' It also says:

Suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Now, it is not limited to just suits in admiralty. It declares immunity and also relates to stipulations as to the release of

On February 23, 1920 the Managers of the Committee of Conference submitted a Conference Report on S. 3076. which set forth the bill in the form in which it was finally enacted. In report, No. 669, 66th Congress, 2nd Session, the Managers on the part of the House made a statement which contained among other things, the following:

> "1. Section 1 of the House amendment has been rewritten. As amended, it eliminates the provision declaring all vessels of the United States to be public vessels, and excludes the Panama Railway Co. from the operation of the bill.
>
> 2. In section 2 the words 'or intended to be employed in the carriage of cargoes or of passengers for hire' have been stricken out, and the words 'as a merchant vessel or as (sic) a tugboat operated by such corporation.'* The effect of this change is to exclude from the scope of the bill certain public vessels not employed as merchant vessels, but that occasionally carry persons and property for hire, and to make certain that tugboats employed as auxiliaries to the merchant fleet are made subject to the proposed act."

Thus was shown the importance of the carriage of persons or property for hire as determining the character of a vessel and the scope and jurisdiction of the District Courts under the proposed bill.

The deliberations in Congress show that the Congressional intent never included any category or classi-

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various public vessels from arrest. *But throughout the entire bill, Mr. Chairman, from first line to the last, the clear intent and purpose is to restrict it to merchant vessels; vessels employed in carrying cargo for hire, or intended to be so employed. There is nothing in here that can be construed to include battleships, submarines, Navy tugs, or any other of the vast number of vessels afloat which are owned by the Government.*"

* The words "substituted therefor" or words to that effect, were apparently omitted here.

fication other than public vessels of the United States on one hand, and all vessels employed as merchant vessels on the other. It is clear that the term "public vessels of the United States" referrs to "battleships, submarines, Navy tugs, or any other of the vast number of vessels afloat which are owned by the Government"; and that the words "employed as a merchant vessel" referred to "vessels employed in carrying cargo for hire, or intended to be so employed." *Cong. Rec. Vol. 59, Part 2*, page 1751, quoted *ante*, p. 21, n. Compare *The Nishmaha* (D. Ore. 1920), 263 Fed. 959, as to the meaning of the similar words in Section 9 of the Shipping Act, 1916.

There is no indication whatever of Congressional intent that a cargo vessel usually employed in the carriage of cargo for hire would lose her character as a merchant vessel if she should be engaged in the carriage of Government cargo for hire. Her merchant character is fixed by her employment in the earning of money for her owner by the carriage of cargo for hire. There is no indication of Congressional intent that the *nature* of the cargo which she carries for hire would make the slightest difference in her status or character for the purposes of the Act.

After all, the cargo on board the *Portmar* was Government-owned, and it was vital in the public interest that such cargo reach its destination without interference. If the *Portmar* was subject to arrest while so engaged, the carriage of that cargo might have been seriously interrupted. It was in such a situation, among others, that the Suits in Admiralty Act was designed to confer immunity of the vessel from arrest. The vessel was being operated "for the United States", being committed to the carriage of Government goods and stores, and it was just as important in the public interest that the *Portmar* should be immune from arrest while so engaged, as that her cargo

should be immune from arrest, as it clearly was. What good would immunity of the cargo accomplish if the vessel itself could be tied up by process *in rem?*

The test under the decisions of this Court already cited is whether at the material time the vessel is privately owned and operated in the carriage of passengers or cargo for hire; not the kind of passengers or cargo which the vessel may be carrying. There is no middle ground between the categories established by the decisions of this Court. A vessel privately owned, privately manned and operated is "employed as a merchant vessel", no matter what kind of persons or cargo she may carry so long as she carries such persons or cargo *for hire.*

It is clearly within the scope of the Act, and of the intent of Congress in the passage of the Act, that a privately owned vessel while engaged in the business of carrying Government cargo for hire is "employed as a merchant vessel" and as such should be immune from arrest.

It follows that the District Court had jurisdiction under Sections 1 and 2 of the Suits in Admiralty Act, 1920, of the claim against the United States, here presented. *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352.

SECOND POINT.

IF THE *Portmar* WAS NOT A CONSTRUCTIVE TOTAL LOSS UNDER THE WAR RISK INSURANCE POLICIES, THE GOVERNMENT IS LIABLE TO PETITIONER FOR CHARTER HIRE TO THE DATE OF REQUISITION OF TITLE TO THE VESSEL.

(a) *The net amount of the charter hire claim.*

If the *Portmar* was not a total loss, either actual or constructive, the United States is liable for charter hire in

addition to victualing charges allowed by the District Court. R. 777.

The provisions of Articles 1.02, 2.03 and 2.04 of the charter, which govern the rate and payment of the charter hire, will be found in Appendix II.

The amount of charter hire for the period February 19, 1942 to noon on November 17, 1942, when title to the damaged vessel was requisitioned, was established in the evidence at $360,026.71. R. 151, 742.

From that sum there must be deducted operating expenses saved by petitioner, because the vessel could not be operated, in the sum of $92,220. R. 25, 223, 742.

The net charter hire claim, therefore, amounts to $267,806.71.

(b) *Cessation of hire on constructive total loss under the war risk insurance.*

The reference to constructive total loss in Article 2.03 of the charter contemplated a constructive total loss under the war risk insurance policies specified in and the form of which was prescribed by Article 2.17 of the charter.

If there be any contention that the Government's liability for charter hire terminated on any kind of constructive total loss other than that recoverable under the war risk insurance, such contention is contrary to the provisions of the documents. Article 2.17 of the charter prescribed the form of the war risk insurance. Appendix II; R. 35. Article 1.03 fixed the amount of the valuation to be insured. Appendix II; R. 20. Said insurance as prescribed was taken out by petitioner and approved by the Maritime Commission. R. 715.

The term "constructive total loss" is peculiar to marine insurance. *Assicurazioni Generali* v. *Bessie Morris Co.*

[1892], 2 Q. B. 652. The expression has no other meaning than that which is given to it by the law of marine insurance. It must be related to an existing policy. *Manchester Ship Canal Co.* v. *Horlock* [1914], 2 Ch. 199; *Roura and Forgas* v. *Townend* [1919], 1 K. B. 189; *Robertson* v. *Petros Nomikos Ltd.* [1939], A. C. 371.

It is plain that under the terms of Article 2.03 of the charter the Government was obliged to pay hire for the use of the vessel at the rate stipulated in Article 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the agreed port of redelivery as specified in Article 1.04, *unless*, prior to such redelivery, "the vessel shall be lost . . . or in the case of a constructive total loss . . .", in either of which events the obligation to pay hire terminated.

Hence, since the *Portmar* was never "lost", in the sense of actual total loss, the sole question to be determined is the meaning of the words "in the case of a constructive total loss" as used in Article 2.03.

The petitioner, believing that the vessel was a "constructive total loss" tendered abandonment to the underwriters, but they declined to accept the tender. Hence, until that issue between the owner and the underwriters is decided, the liability of the Government to continue paying hire under the provisions of Article 2.03 cannot be determined, for the Government's liability to pay hire terminated only if the vessel became a "constructive total loss" within the meaning of the war risk insurance policies.

If this Court determines, contrary to the decision of the District Court and our contentions in Case No. 303, pending before this Court with the present case, that the *Portmar* did not become a "constructive total loss" within the meaning of the war risk insurance policies, then the Gov-

ernment's obligation under Article 2.03 to pay hire continued until the date of requisition of title to the vessel.

The charter and the insurance herein were closely related. The charter contemplated and specified the precise form and valuation of the war risk insurance, and provided that the Charterer should pay for it.

The present policies contained the following clauses:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.
>
> "In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.".

Policies, Libelant's Exhibits 6, 7, 8. R. 70-71, 712.

The District Court herein held that by the first paragraph of the above quoted clause, the policies adopted the English rule. R. 752.

To say that hire should cease on constructive total loss under any rule not contemplated by the insurance specified in the charter, and irrespective of the war risk insurance so prominently considered in the charter provisions, distorts the plain intent and purport of the arrangement.

In short; the test of constructive total loss was intended to be, and should be held to be, the same in both documents.

(c) *The charter provisions for payment of hire.*

It is a paramount fact that by the terms of the charter the United States agreed to pay the charter hire until redelivery of the vessel, and during loss of time caused by,

or during repairs due to, breakdown, stranding or other accident or damage to the vessel caused by war or warlike acts. See the provisions of Articles 2.03 and 2.04 of the charter set forth in Appendix II.

Explicit provisions for the payment of hire override general charter exceptions. *The Clyde Commercial Co. v. West India S. S. Co.* (*The Santona*) (2 Cir. 1909), 169 Fed. 275.

The present charter makes sure of that principle by the concluding words of Article 2.16, the general exception clause, which relieved either party of liability for, among other things, "restraint of princes";

> "* * * No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter."

Petitioner's claim as to charter hire was based on the alternative that it might be held that the damages sustained by the *Portmar* did not constitute a total loss, either actual or constructive under the war risk insurance, but only a partial loss. On that basis, if the loss were only partial, then the foregoing charter provisions for payment of hire until the completion of repairs before redelivery require full payment of charter hire up to the date of the requisition of title.

The Government's requisition of title to the vessel on November 17, 1942 put an end to further performance of the charter by the *Portmar* and to further payment of hire, because from that date forward petitioner did not own the vessel as contemplated by the charter. But if, contrary to petitioner's contentions and the findings of the District Court in Case No. 303, it should be held that the *Portmar* was not a constructive total loss within the terms of the war risk insurance policies, the liability of the Government

is clear as to payment of the charter hire up to the time of the requisition of title.

(d) *Petitioner performed all its obligations under the charter.*

The District Court held that "libelant duly performed all the terms and conditions of the charter to be performed on its part". R. 756.

There is no room for criticism of petitioner for failing to operate the vessel after the enemy attacks of February 19, 1942, because petitioner was prevented by supervening circumstances from continuing the operation of the vessel. The general exceptions contained in Article 2.16 of the Charter, "act of war, act of public enemies * * * arrest and restraint of princes" afford petitioner a complete defense to any contention of non-performance or breach of charter.

There was a suggestion below, that petitioner "abandoned the vessel".

But there is a sharp distinction between a tender of abandonment to the underwriters of the interest of the assured in the vessel, and actually to "abandon" the vessel itself. The former is required of the assured as a condition for recovery of a constructive total loss. *Knight* v. *Faith* [1850], 15 Q. B. 649. The latter means "give up for lost". See *Arnould on Marine Insurance,* V. 2, Section 1091-(a), where the author discussed the distinction between the term "abandon" as found in Sections 60 and 61 of the British Marine Insurance Act; also *Court Line, Ltd.* v. *Rex,* (1943), 2 All. E. R. 357 at 362, 365; and *Michelson,* R. 358, 422-423, 445, 447.

After the enemy attack, petitioner did all that it could to protect the vessel and its interest in the vessel, and con-

tinued to do so after the underwriters rejected the tender of abandonment.

The *Portmar* was never physically "abandoned" by petitioner. On February 19, 1942 the Master personally lowered the port anchor to hold the vessel in position on the rise of the tide in order to control the entry of water so that the vessel would not turn over and the boilers explode. R. 725-726. During the following days the Master remained on or near the *Portmar* and returned to the ship whenever he could. R. 726-729. On February 21st, the Master personally lowered the starboard anchor in order to keep the vessel from going adrift if a heavy storm should come up. R. 727. He tried by every possible means to get in touch with his owner and obtain their instructions with respect to the vessel. R. 727, 728, 730. When he left the vessel on March 3, 1942, he intended to return. R. 353, 358. During the interval March 3rd to March 10th, 1942, the Master and crew of the *Portmar* were prevented from returning to the vessel because they were confined under guard in the military camp. R. 729. When the crew was repatriated from Melbourne, the Master remained in Australia to look after the owner's interest in the vessel and employed counsel to represent him and protect the interests of the vessel and her owner. R. 733. The Master endeavored by all possible means to return to Darwin and failing in this to get information as to the situation of the *Portmar* and what was being done with her. R. 733. When the Master learned that the *Portmar* was being towed to Brisbane, the Master went from Melbourne to meet her, and arrived at Brisbane on July 29, 1942. R. 737. See also cables and letters R. 607-621.

The vessel was then in complete possession and control of the Army, R. 211, 737. But the facts show that petitioner

never "abandoned" the vessel in the sense that it gave her up. On the contrary, petitioner, through the Master, made every attempt possible under the circumstances, but was prevented from accomplishing the necessary repairs to restore the vessel to classification and from continuing the operation of the vessel under the charter by forces directly within the exceptions set forth in Article 2.16 of the charter, especially "act of public enemies" and "restraint of princes".

The uncontroverted testimony of Col. T. G. Plant, Chief of Water Transportation in the Southwest Pacific Area, and of Major Haggett shows that the Army took possession of the *Portmar* after the loss, to patch her up and use her as an expendable vessel for military purposes before the actual Government requisition of title that occurred on November 17, 1942. R. 187-188, 195-196, 211, 737. But on the facts found by the District Court below, it cannot properly be said that petitioner "abandoned" the *Portmar* nor performance of the charter.

(e) *The charter was not frustrated, even though the vessel was a constructive total loss.*

There is no doubt that when the Government on November 17, 1942, pursuant to Section 902 of the Merchant Marine Act, 1936, as amended, exercised its sovereign war power to requisition title to the *Portmar* among other vessels (R. 624-625) the obligation to pay hire ceased. It matters little whether that obligation terminated by "frustration", or by "destruction of the subject matter" or on the simple principle that petitioner was not entitled to receive hire for a vessel it no longer owned. But the Government would extend the "frustration" of the charter to the date of the disaster, even though the *Portmar* was not a constructive total loss under the war risk insurance, in

order to avoid liability for hire between the disaster and the requisition of title.

Articles 2.03 and 2.04 provided for continuation of payment of charter hire during any period in which the vessel might be out of service by reason of damage due to war risk. The charter provided for cessation of hire only in the event of constructive total loss under the war risk insurance. In the face of these explicit provisions there is not any basis for the suggestion that the damage to vessel "frustrated" the charter because there is no frustration when the charter provisions cover the contingency.

The cases cited by the Court of Appeals below turned upon the happening of supervening events, *not provided for in the contract.* The doctrine of frustration is based on a condition implied in law. It operates only where there is no contract provision for the contingency. *Texas Co.* v. *Hogarth Shipping Co.*, (1921) 256 U. S. 619, 630. When the contract makes provision for the very event, no condition can be implied which would be inconsistent with the contract provision. *F. A. Tamplin S. S. Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 A. C. 397; *Larrinaga & Co. Ltd.* v. *Societe Franco-Americaine, etc.* (H. L. 1923), 39 T. L. R. 316, 320; *Banck* v. *Bromley & Son* (K. B. Div. 1920), 37 T. L. R. 71.

It is settled, and the Court below accepted the principle, that the "putative frustration" must be decided by the situation as it appears at the time of the interruption. R. 800; *Bank Line, Ltd.* v. *Arthur Capel & Co.* [1919], A. C. 435, by Lord Sumner at p. 454; *The Claveresk* (2 Cir. 1920), 264 Fed. 276, 282-283; *Borup* v. *Western Operating Corporation* (2 Cir. 1942), 130 F. 2d 381, 386.

Under that precept, no frustration of the charter occurred as contended by the Government below, before the requisition of title to the vessel on November 17, 1942.

Instead of applying that principle, the Court of Appeals departed from its own statement of the rule, and used hindsight of the events which occurred between January 5, 1942 and November 17, 1942 when the United States requisitioned title to the *Portmar*, to support a holding that as of January 5, 1942, although neither of the parties to the contract thought so, their agreement was at an end.*

There is not any evidence of any orders with respect to the *Portmar* on January 5, 1942 or at any time before the loss of February 19, 1942, to the effect that the *Portmar* would not be allowed within a reasonable time, to complete her round voyage. The facts are to the contrary. The passages from port to port in Australia were a distribution of the outward cargo according to the needs of the Army, the shipper of the cargo. R. 522, 525-529. That was no different from what the *Portmar* would have done in the Philippines if the war had not occurred and if she had gone to the Philippine Islands in accordance with the charter.

The facts do not show such urgent military need for the *Portmar* as the Court of Appeals has found, relying solely on the testimony of Colonel Plant, R. 795, at any time before the loss on February 19, 1942. Colonel Plant did not arrive in Australia until the end of March, 1942. R. 183. The military situation and emergency of which he had actual knowledge arose from the circumstances which existed after his arrival in Melbourne. R. 183-5. The fact that on February 4, 1942 the *Portmar* was ordered from Port Darwin to Wyndham, R. 293, with only 2000 drums of gasoline, and returned from Wyndham to Darwin empty of any cargo,

* It may also be noted that the Court of Appeals below held that a frustration of the voyage occurred at a point not pleaded by the underwriters in their answer, R. 78-84, and not included in the declaration of their proctors when questioned by the District Court. R. 113.

R. 721, hardly indicates any such critical military need for the use of the vessel *at that time,* as the Court of Appeals below has found from Colonel Plant's testimony as to events which occurred much later.

The sailing to the port of Koepang, Timor, was no more than a temporary incident, she being then free of her cargo. For all that appeared, there was to be only a round trip from Darwin across the Timor Sea to Timor and return. The Island of Timor was then in the hands of the Allies of the United States. Japanese troops did not land on Timor until March 1, 1942. R. 722. When the *Portmar* returned to Darwin from that expedition on February 18th she was ordered to berth in her turn and discharge the artillery and troops which were then on board. R. 723. The Timor expedition was ended. There were no further orders whatever with respect to the *Portmar* except, as already seen, that she was fixed by the U. S. Maritime Commission for the return leg of the round voyage from New Caledonia to Philadelphia with a cargo of chrome ore. R. 142-143, 720, 796-797.

The possibility of damage to the vessel while navigating under military controls was anticipated and provided for in Article 2.04 of the charter.

The possibility of orders to the vessel by the government of any nation or its representative was clearly anticipated and provided for by Article 2.27 of the charter.

Apart from the provisions of the contract and the authorities above cited, the conduct of the parties themselves was directly contrary to the finding of the Court of Appeals that a frustration of the voyage occurred on January 5, 1942, or that a frustration of the voyage occurred at any time before the loss occurred on February 19, 1942.

It must be remembered that the voyage in question was a round voyage. On January 17, 1942 petitioner was

informed that U. S. Lines was to be the homeward agent of the U. S. Maritime Commission for a cargo of chrome ore to be loaded on the *Portmar* at New Caledonia for Philadelphia. R. 142-143.

Petitioner's and charterer's intention to complete the round voyage never changed before word was received of the loss and the impossibility of salvage. R. 157.

On February 13, 1942 the *Portmar* was temporarily impressed into the service of the United States by requisition of use when the United States, as sovereign, ordered the *Portmar* to load the artillery detachment, guns and equipment, and on February 14, 1942 when she was ordered, in convoy conference on board *U. S. S. Houston*, to sail in convoy toward the Island of Timor. *United States* v. *Russell* (1871), 13 Wall. (U. S.) 623, 627; *Kimball* v. *U. S.* (1869), 5 Ct. Cl. 252; *American Mail Line Ltd.* v. *U. S.* (1944), 101 Ct. Cl. 377.

Notwithstanding that the vessel was temporarily impressed into the public service by the United States as sovereign, the Master's action in following such government orders was not a deviation, breach of orders or neglect of duty because of the specific provisions of Articles 2.15 and 2.27 of the charter; and the obligation to pay the hire under Article 2.03 of the charter continued because of the provisions of Articles 2.04-(b) and 2.27.

The United States continued payment of the charter hire and has paid the hire up to February 19, 1942, the date on which the vessel became a constructive total loss, in accordance with the provisions of Articles 2.03, 2.04 and 2.27 of the charter. *Charter*, R. 22-24, *Findings of Fact*, R. 742.*

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* On June 15, 1944, the hire, theretofore paid to March 1, 1942, was adjusted to February 19, 1942 by a credit on hire due to petitioner on another vessel. *Computation of Hire*, Exhibit 24 (separate volume submitted).

The record completely demonstrates that both parties intended, until the constructive total loss of the vessel, to complete the "round voyage."

It is, to say the least, unprecedented, as conceded by the Court of Appeals (R. 798) that the performance of a contract should be held frustrated, where the parties to that contract thought it was in effect and were continuing with performance so far as government restraint permitted. The Court has thus imposed upon the parties to the charter a decision which they did not make at the time.

To the contrary, in *Bank Line, Ltd.* v. *Arthur Capel & Co.* [1919] A. C. 435, at page 460, Lord Sumner, concluding his opinion, stated the exact reverse: "* * * Both thought its result was to terminate their contractual relation by the middle of June and, as they must have known much more about it than I do, there is no reason why I should not think so too. * * *"

Accordingly, the facts do not show any frustration of the charter prior to the requisition of title, notwithstanding the damages sustained in the enemy attacks. The Government should be held liable for the Charter hire as claimed, if this Court should decide that the *Portmar* was not an actual or constructive total loss under the war risk insurance.

THIRD POINT.

IF THE WAR RISK INSURANCE WAS VITIATED OR TERMINATED BEFORE THE LOSS, OR IF PETITIONER IS LIABLE TO UNDERWRITERS FOR AN ADDITIONAL PREMIUM BY REASON OF WHAT WAS DONE BY THE *Portmar* UNDER SOVEREIGN ORDERS OF THE UNITED STATES OR ITS REPRESENTATIVES, THE UNITED STATES IS LIABLE BY VIRTUE OF ARTICLE 2.17 OF THE CHARTER TO INDEMNIFY PETITIONER AGAINST ANY AMOUNT THUS NOT RECOVERABLE FROM THE WAR RISK UNDERWRITERS OR FOR ANY SUCH ADDITIONAL PREMIUM.

(a) *If the war risk insurance terminated before the loss.*

If this Court affirms the decision of the Court of Appeals below in No. 303 that the underwriters were discharged from liability and that the war risk insurance terminated at Brisbane on January 5, 1942, by reason of military control of the vessel, then the Government should be held bound to indemnify petitioner as to any loss which otherwise would have been covered by said war risk insurance.

The provisions of Article 2.17 of the Charter, set forth in Appendix II, declare a clear intent that the vessel was to be protected by the contemplated war risk insurance throughout the voyage. The last paragraph of Article 2.17 provided as follows:

> "The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient."

The provisions of Article 2.27 provided that if the vessel followed sovereign orders, any such departure from the charter voyage would not constitute a deviation.

It follows that if the charterer, even as a sovereign, by specific orders to this particular ship, directed the vessel on a voyage or passage which terminated the liability of the underwriters under the war risk insurance, the Government is obliged, by reason of breach of the undertaking stated in the last paragraph of Article 2.17, to indemnify petitioner to the extent of any loss which would otherwise have been covered by such insurance.

The Government contended below and may argue here, that it is not liable for any such indemnity because its orders to the *Portmar* were given in its sovereign capacity, and for such a contention the Government cited below the cases of *Horowitz* v. *United States* (1925), 267 U. S. 458, and *Froemming Bros. Inc.* v. *United States* (1947), 108 Ct. Cl. 193.

This startling proposition arises from a misunderstanding of the *Horowitz* and *Froemming* cases, which hold only that the Government is not liable in contract for losses sustained by a contractor due to *general sovereign acts affecting all parties similarly situated*, and where the contract did not contain any explicit provision that such acts should not be done by the United States.

In *Horowitz* v. *United States, supra*, the plaintiff contracted to buy silk from the Ordnance Department. Delivery of the silk to the plaintiff was delayed because the Government through the U. S. Railroad Administration, placed an embargo on *all* shipments of silk by freight. Thereafter the Government shipped the silk to the plaintiff and the plaintiff resold on a declining market at a loss, for which the suit was brought. This Court said, 267 U. S. at page 461: (italics ours)

"It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from *its public and general* acts as a sovereign. *Deming* v. *United States*, 1 Ct. Cls. 190, 191; *Jones* v. *United States*, 1 Ct. Cls. 383, 384; *Wilson* v. *United States*, 11 Ct. Cls. 513, 520. In the *Jones* case, *supra*, the court said: 'The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, *so long as they be public and general*, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. *Though their sovereign acts performed for the general good may work injury to some private contractors*, such parties gain nothing by having the United States as their defendants.'"

In *Froemming* v. *United States*, *supra*, the plaintiff sued the Government for losses incurred under the performance of its work under a Government contract because the Government did not do certain preparatory work in time to enable the plaintiff to proceed promptly. The Government admitted its failure to do the preparatory work but took the position that after the attack on Pearl Harbor and the threatened danger to the Panama Canal, the delay was due to directives of the military authorities in Washington which diverted labor and material to other and more immediately important work. The rule of the *Horowitz*

case was invoked and the Government's position was sustained. In the decision, 108 Ct. Cl. at page 213 the Court said: (italics ours)

> "* * * But whatever was done was done by the military command and it was the responsible agent of the sovereign at the time. *There is no indication that any discrimination was purposely practiced against the plaintiff.* * * *"

In neither the *Horowitz* case, nor the *Froemming* case was there any provision in the contract that the United States would not do the very act complained of; and the acts there involved were *general sovereign acts,* affecting not only the contractor, but all persons within the purview of the Government orders or regulations.

Here the sovereign acts were specific as to the *Portmar* alone, and were a breach of the express undertaking in the last paragraph of Article 2.17 of the charter.

Under such circumstances the Government is as liable for breach of contract as any private citizen would be.

> *United States* v. *Bostwick* (1876), 94 U. S. 53, 69;
> *United States* v. *Peck* (and cross action) (1880), 102 U. S. 64;
> *Sunswick Corp.* v. *U. S.* (1948), 109 Ct. Cl. 772; 75 F. Supp. 221;
> *Houston Construction Company* v. *U. S.* (1903), 38 Ct. Cl. 724.

In *Sunswick Corp.* v. *U. S., supra,* the claim was for increased labor costs incurred in the performance of a lump sum contract with the United States. The act of the Government which increased the costs was a directive order of the Federal Wage Adjustment Board which specifically directed the plaintiff to pay an increased wage

rate retroactively to the beginning of the project. On that ground the Court of Claims distinguished the *Horowitz* case and other cases cited therein, and held the Government liable.

If any diversion of the *Portmar* from the insured voyage had the effect of terminating the war risk insurance, petitioner did not know what was going on, and thus had not any opportunity to restore or to replace the insurance. R. 145-146.

It follows that if this Court affirms the decision of the Court of Appeals in No. 303 that the underwriter's liability under the war risk insurance policies came to an end because the *Portmar's* voyage was frustrated by military control in Australia, then the United States violated its undertaking set forth in the last paragraph of Article 2.17 of the charter, in sending the *Portmar* on new voyages without any war risk insurance whatever, and should be held liable to indemnify petitioner accordingly, for any amount, with interest, which petitioner would have been entitled to recover from the underwriters if the war risk insurance had remained in effect. *Talbot* v. *U. S.* (1871), 7 Ct. Cl. 417.

(b) *If there was a deviation which entitled the war risk underwriters to additional premium.*

Article 2.17 of the charter provided that the charterer should pay for insurance on the vessel in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies; and that the vessel should not be required to sail on any voyage until the insurance contemplated by Article 2.17 had been placed by the owner. *Post*, Appendix II.

In Article 2.17 of the Charter the United States assumed full liability to pay all premiums due under the war risk

insurance contemplated in that Article of the charter. It has been conceded that the war risk insurance policies petitioner's Exhibits 6, 7 and 8, were such insurance. R. 261, 262-263. See also *Letter, February 20, 1942,* Exhibit 10, R. 602.

If, contrary to the District Court's decision, and contrary to *Rickards* v. *Forestal etc. Co. Ltd.*, [1942] A. C. 50, this Court should hold that petitioner's losses with respect to the *Portmar* were, by reason of deviation, covered by the war risk insurance only by virtue of the "Held Covered" clause, and that the war risk underwriters are entitled to a set-off to the extent of an additional premium thereunder, or otherwise,* then by virtue of the provisions of the last paragraph of Article 2.17 of the Charter, the United States is liable to indemnify petitioner against any loss by reason of such additional premium, or to the extent of reduction of the proceeds of such insurance by virtue of such a set-off.

If any "deviation" or "change of voyage" occurred as described in the "Held Covered" clause of the policies (R. 70-71, 714), then any such passage was a voyage in itself and was directly covered by the warranty of the last paragraph of Article 2.17 of the charter, quoted *ante,* p. 37.

Thus by direct contract to pay the premium on the war risk insurance contemplated by Article 2.17 of the charter, and by warranty that the *Portmar* would not be required to sail on any voyage without such insurance, the United States is obligated to make good to petitioner the amount of any additional premium allowed by set-off to the war risk underwriters, or the amount of any reduction of the proceeds of such war risk insurance by virtue of such set-off.

---

* Any additional premium so allowed should not exceed 6½% of the amount insured, in accordance with the rate published by the American Syndicate, in effect February 15, 1942. R. 606; Exhibit 54, in exhibit volume separately submitted.

FOURTH POINT.

THE UNITED STATES IS LIABLE, PURSUANT TO THE PROVISIONS OF ARTICLE 2.11 OF THE CHARTER, TO INDEMNIFY PETITIONER AGAINST ANY LOSS OR LIABILITY ARISING FROM COMPLIANCE WITH ORDERS GIVEN BY THE UNITED STATES OR ITS REPRESENTATIVES, EVEN THOUGH SUCH ORDERS WERE GIVEN AS A SOVEREIGN.

The Government naval orders which transferred the *Portmar* to the direction of the British and Australian naval authorities (R. 279), and which later put troops and artillery on board the *Portmar* and sent her out toward Timor, in convoy of the Cruiser *Houston* (R. 722-723, 744-745) were those of the United States as sovereign rather than as charterer. R. 716, 718, 744-745, 746-747. In the latter capacity the United States had no power or authority to give any such orders.

Under earlier forms of charter the usual indemnity against consequences of complying with charterer's orders would not cover the present facts. *Larrinaga S. S. Co. Ltd. v. King* [1945], A. C. 246.

But here the last paragraph of Article 2.11 of the charter (see Appendix H, R. 28) contained a much broader form of indemnity contract, as follows: (italics ours)

> "The Charterer shall indemnify and hold harmless the owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, *given pursuant to this Article or any other Article of this Charter.*"

The words "or any other article of this charter" relate directly to the orders which the United States, in its sov-

ereign capacity, gave to the Master as forecast in Article 2.27.

The undertaking of indemnity in the last paragraph of Article 2.11 of the Charter does not qualify the nature of the orders contemplated. If it was intended to limit the indemnity to orders of the United States in its capacity of charterer, it would have been simple enough to say so. But no such limitation was made. The provision specifically enlarges the usual undertaking. There is no ambiguity. The provision should be enforced according to its plain terms. *Calderon* v. *Atlas S. S. Co.* (1898) 170 U. S. 272; *Adams, et al.* v. *Mackenzie* (1863), 13 C. B. (N. S.) 442.

It follows that when the United States, as sovereign, gave orders to the vessel, the Master not only had liberty to, but was bound to, comply (*Rickards* v. *Forestal etc.* [1942], A. C. 50, 80) without subjecting the carrier to liability for deviation; and the United States was bound by its express contract to indemnify petitioner against any loss by reason of such compliance. *Sunswick Corp.* v. *U. S.* (1948), 109 Ct. Cl. 772; 75 F. Supp. 221.

No contention is made here for indemnity with respect to general sovereign orders applicable to all American vessels alike. We are here concerned with specific military orders to the vessel given as sovereign, affecting the *Portmar* alone, not the general orders of a sovereign affecting all parties similarly situated, and not within the rule of the *Horowitz* and *Froemming* cases, *ante*, pp. 38-40.

In view of the broad terms of the indemnity contract contained in the last paragraph of Article 2.11 of the charter, if this Court should affirm the Court of Appeals (in No. 303) and hold that any loss sustained by petitioner with respect to the *Portmar* is not recoverable from the war risk underwriters, or is subject to set-off in the amount of any

additional premium allowed under the "Held Covered" clause, then the United States should be held liable to indemnify petitioner for any amount, whether of principal or interest, which petitioner would have been entitled to recover from said war risk underwriters but for compliance with such orders, or any other loss or liability sustained by reason of compliance with such orders.

Conclusion

This Court should hold that the District Court had jurisdiction of the libel herein under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920, and the decision of the Court of Appeals herein should be reversed.

If this Court should hold in Case No. 303, contrary to the decision of the District Court and our contentions therein, that the damages sustained by the *Portmar* did not constitute a constructive total loss under the war risk insurance policies, then the mandate of this Court should issue directing the District Court herein to enter decree in favor of petitioner against the United States for charter hire less operating expenses saved, together with victualling charges as allowed below, in the total sum of $268,045.21 with interest according to law.

If this Court should hold in Case No. 303, contrary to the decision of the District Court and our contentions therein, that the war risk insurance of the *Portmar* was terminated or vitiated before the Japanese attacks on the *Portmar*, by reason of compliance of orders given to the *Portmar* by the United States or its representatives, or that the war risk underwriters are entitled to a set-off by reason of additional premium under the "Held Covered" Clause of the war risk insurance policies, then by virtue of the provisions of Articles 2.11 and 2.17 of the *Portmar*

charter, this Court should direct that the District Court enter decree herein in favor of petitioner against the United States for indemnity as to any amount, whether of principal or interest, for which petitioner is thus denied recovery against said war risk underwriters.

Dated December 12, 1952.

Respectfully submitted,

EDWIN S. MURPHY,
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IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Of Counsel.

APPENDIX I.

Pertinent provisions of the Suits in Admiralty Act, March 9, 1920, 41 Stat. 525, Secs. 1 and 2 (46 U. S. C. 741-742):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *"

Pertinent provisions of the Public Vessels Act, 1925, March 3, 1925, 43 Stat. 112, Section 1 (46 U.S.C. 781):

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel *in personam* in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920."

APPENDIX II.

Pertinent Clauses of the time charter of SS. Portmar, Exhibit A, Attached to Libel, R. 18-38.

Contract MCc-1915

TIME CHARTER.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

WITNESSETH:

WHEREAS:

I. The Charterer has determined, pursuant to the provisions of an Act of Congress approved June 6, 1941 (Public Law 101—77th Congress), that vessels in addition to those otherwise available are necessary for transportation of foreign commerce of the United States, or of commodities essential to the national defense;

II. The Charterer deems the terms and conditions hereof and the period of this Charter and the restrictions herein

contained to be necessary or desirable for the protection of the public interest and the rate of hire herein provided to be fair and reasonable.

NOW, THEREFORE, the Owner and Charterer agree:

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. * * *

* * *

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

* * *

PART II.

ARTICLE 2.01. The Vessel shall be placed at the disposal of the Charterer at the port of delivery at such safe ready dock, wharf or place as the Charterer may direct. Any time lost by the Vessel awaiting the availability of such dock, wharf or place shall count as time on hire. The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and, as far as due diligence can make it so, tight, staunch, strong and in every way fitted for service, having water ballast, winches and power sufficient

to run all the winches at one and the same time and a Master and a full complement of officers and crew for a vessel of her tonnage, and due diligence shall be exercised by the Owner to maintain her in such state during the currency of this Charter. The Vessel shall be employed in carrying lawful merchandise, including petroleum or its products in proper containers, between safe ports or places, in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct.

ARTICLE 2.02. The whole reach and burthen of the Vessel's holds, decks, and usual places of loading (but not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only space proper and sufficient in the opinion of the Master for Vessel's officers and crew, Master's cabin, tackle, apparel, furniture, provisions, fresh water, stores and fuel.

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from, or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the casualty last occurring shall be the time when hire ceases. Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time. * * *

ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or * * *

Provided, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

* * * *

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; or * * *

* * * *

* * * Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for.

ARTICLE 2.05. The Owner shall provide and pay for: all provisions; all galley, cabin, deck and engine room stores; fuel for cooking; wages of, and consular, shipping and discharging fees and other expenses pertaining to, the Master, Officers and Crew (except as herein otherwise provided); 25% of all fresh water used by the Vessel if a steamer, or 75% of a motorship, all water ballast; and insurance (except as herein otherwise provided) on the Vessel.

ARTICLE 2.06. The Charterer shall (except as herein otherwise provided) provide and pay for: all fuel (except for cooking) 75% of all fresh water (except water ballast) if the Vessel is a steamer, or 25% if a motorship; all port charges, pilotages, light, dock, canal and other dues, stevedoring, agencies, commissions, reasonable ballast, (except water ballast, and the cost of loading and discharging it); tug assistance and boating where incurred for the Charterer's business, and all other charges and expenses whatsoever except those which, by the terms of this Charter, are specifically made payable by the Owner. * * *

* * *

ARTICLE 2.10. The Charterer shall furnish the Master from time to time with all requisite instructions and sailing directions, in writing, * * *

ARTICLE 2.11. Subject always to the direction of the Charterer, the Master shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with Ship's crew and boats; and shall use due diligence in caring for and ventilating the cargo. The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages; and Charterer shall load, stow, trim and discharge the cargo at its expense under the supervision of the Master, who is to sign bills of lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts. The Master, officers and crew of the Vessel in supervising loading, stowing, trimming, tallying and discharging, shall be deemed the agents of the Charterer, except in so far as such supervision pertains to the safety of the Vessel. * * *

The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter.

* * *

ARTICLE 2.16. The Vessel, her Master and Owner, shall not unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: * * * fire, unless caused by the personal design or neglect of the Owner; * * * stranding, or peril, danger or accident of the sea or other navigable waters; * * * or from any other cause of whatsoever kind arising without the actual fault of privity of the Owner. And neither the Vessel, her master or Owner, nor the Charterer, shall unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, * * * arrest or restraint of princes, rulers or people, * * * No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter.

ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured * * *

The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

* * * *

ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer.

* * *

ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; * * *

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No. 262

In the Supreme Court of the United States

OCTOBER TERM, 1952

CALMAR STEAMSHIP CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the granting of a writ of certiorari in this case limited to the question of jurisdiction decided by the court below. Petitioner's reserved questions (Pet. 7), not having been considered because of the holding of the absence of jurisdiction, are not appropriate issues for this Court.

Section 1 of the Suits in Admiralty Act (46 U. S. C. 741) provides that no vessel owned by the United States, or operated by or for the United States, shall be proceeded against by arrest or seizure. Section 2 of the Act (46 U. S. C. 742) vests jurisdiction in the district courts over suits against the United States involving such vessels, if suits could have been maintained against private owners, but only if the vessel "is employed as a merchant vessel." The important issue raised by the petition is whether a freighter admittedly operated for the United States by its private owner, and carrying military supplies of the United States for hire, should be considered as not "employed as a merchant vessel."

The Government urged in the district court and again in the court below that, since the goods carried were government munitions, the vessel, although privately owned and operated, was not employed as a merchant vessel. The district court refused to accept this argument and specifically held that the vessel was employed as a merchant vessel (R. 743), but it decided for the United States on another ground. The court below reversed the jurisdictional finding, holding that the nature of the cargo resulted in the vessel's being engaged in public service and thus took it out of the category of vessels employed as merchant vessels.

This is an important question because it involves the fundamental jurisdiction of the district courts over a considerable volume of litigation which, if the opinion below stands, will have to be brought in the Court of Claims or the district courts under the Tucker Act (28 U. S. C. 1346(a); 1491) or the Tort Claims Act (28 U. S. C. 1346(b)). It is clear that jurisdiction would not lie in the district court under the Public Vessels Act (46 U. S. C. 781), since, regardless of whether the vessel was employed as a merchant vessel, it is not disputed that it was being privately operated *for* the United States rather than *by* the United States.

The court below relied upon a line of cases starting with *The Western Maid*, 257 U. S. 419. It is believed that these cases are not controlling on the present issue, since they all involve situations where the vessels were being operated by the United States, rather than for it. In those cases, therefore, the fundamental issue was really whether or not the vessel was actually a public vessel, which, as pointed out above, is not involved in the present case.

The petitioner argues that a result of the present decision is to subject to seizure vessels engaged in carrying government cargoes in circumstances similar to those in the present case (Pet. 11). This argument is based on the assumption that Congress intended to exempt from seizure, by Section 1 of

the Suits in Admiralty Act, all publicly operated vessels, but only those privately owned and operated vessels which were covered by Section 2, which vested jurisdiction in the district courts to hear suits *in personam* against the Government. Although the result suggested by the petitioner may not be required by the language of the statute, since the specific language "employed as a merchant vessel" appears in Section 2 only, and does not constitute a condition to the prohibition of suits in Section 1, the petitioner argues that this was the intent of Congress, and cites some congressional history to support its view. Needless to say, the question of whether or not such vessels are subject to attachment is a question of tremendous importance from the point of view of the Government.

For the foregoing reasons, the United States does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

SEPTEMBER 1952.

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 262

CALMAR STEAMSHIP CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 700-756) is reported at 103 F. Supp. 243. The opinion of the Court of Appeals for the Second Circuit (R. 792-804) is reported at 197 F. 2d 795.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1952 (R. 804-5). The petition for a writ of certiorari, filed on August 7, 1952, was

granted on October 20, 1952 (R. 822). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a privately owned, manned, and operated merchant cargo carrier chartered to the United States, in November 1941, for a voyage to the Philippines (and return) for the carriage of "lawful merchandise" in "lawful trade," and carrying military equipment and supplies, was "employed as a merchant vessel" within the meaning of Section 2 of the Suits in Admiralty Act, so as to confer jurisdiction upon the district court, or whether the owner's suit for additional charter hire and other claims based upon the charter could be brought only in the Court of Claims.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act of 1916, the Suits in Admiralty Act, and the Public Vessels Act, are set forth in the Appendix, pp. 40-43.

STATEMENT

The Federal Government, through the Maritime Commission, and Calmar Steamship Corporation (hereafter termed Calmar) entered into a charter as of November 21, 1941, on a time charter party form numbered MCc 1915, for the use of the cargo-carrying space of *SS Portmar* to transport cargo ("for trading", Art. 1.01, R. 19) on one round voyage from United States West Coast ports to the Philippine Islands and return to United States East Coast ports (R. 18*ff*, 703*ff*). This was done under the authority of Section 3(a) of the Act of

June 6, 1941, P.L. 101, 77th Cong., 1st Sess., 55 Stat. 242, 243, authorizing the Commission to charter vessels if necessary to transport foreign commerce or commodities essential to the national defense (see R. 19). The *Portmar* was a general cargo carrier and had always been used for that purpose by her owner (R. 160, 743).[1]

The time charter (R. 18-38) left the vessel in the owner's possession and control, and provided for payment of charter hire at $4.70 per ton per month and of victualling charges for extra personnel the charterer required to be on board. The owner was to pay all wages of the master, officers and crew. The charter specified that the vessel was not demised to the charterer (Art. 2.21, R. 36) and stated that "The Vessel shall be employed in carrying lawful merchandise, * * * in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct" (Art. 2.01, R. 22).

The owner was to take out and the United States to pay the premiums for war risk insurance unless the Government elected to supply such insurance. The vessel did not have to sail until the insurance had been placed (Art. 2.17, R. 35). The United States, as charterer, agreed to indemnify Calmar against the consequences of following the charterer's orders (Art. 2.11, R. 29). Hire was payable until the vessel was redelivered or was actually or constructively lost (Art. 2.03, R. 22-23). Calmar

[1] She was included as a steam vessel in the official list of *Merchant Vessels of the United States, 1942* (p. 51).

took out war risk insurance with Lloyds underwriters and obtained the Government's agreement to pay the premiums (R. 709-715).

Between November 23 and November 27, 1941, the vessel was loaded by Army stevedores with military materiel, including high octane gasoline, ammunition and military equipment, for carriage to Manila and delivery to the Army (R. 275-6, 715). The manifest was not given to the master, but was kept by a sergeant placed on board as supercargo (R. 276-277, 451, 523-5, 716).

The *Portmar* sailed from San Francisco, November 28, 1941, and followed her secret Navy routing orders [2] until the master learned of the outbreak of war with Japan on December 7, 1941 (R. 716). She then turned south and proceeded to a point six hundred miles south of her naval route where she received naval orders to put into Suva in the Fijis. At Suva, the Navy ordered her to proceed to Sydney, Australia. On arrival at Sydney on December 30, one of her Army supercargoes delivered her manifest to American Army officers. The Australian Naval authorities then ordered her to proceed to Brisbane. At Brisbane, the Army ordered the cargo unloaded, sorted and checked. Thereafter, the major part was reloaded on the *Portmar* with some additional cargo. She then proceeded under Army orders, transmitted through Australian Naval control, to Port Darwin where

[2] These routing orders were the customary naval routing orders issued to all American flag cargo vessels during the emergency, regardless of ownership or charter arrangements (R. 100, 716).

she discharged the bulk of her cargo. On Army orders, she next carried two thousand drums of gasoline to Wyndham. Upon her return to Port Darwin on February 12, 1942, on Army orders, she loaded artillery, military equipment and men and proceeded in convoy to Koepang, on the island of Timor, but following Japanese bombing returned to Port Darwin where she suffered extensive damage and was beached to prevent sinking. (R. 717 *et seq.*). She was finally towed to Brisbane and, while repairs were in progress, she was requisitioned by the Government on November 17, 1942 (R. 625, 738).

The Government paid charter hire in full for the period ending February 19, 1942, when the vessel was beached and abandoned as a constructive total loss, with the exception of a small sum payable for victualling the supercargoes (R. 742).

On February 11, 1944, petitioner Calmar sued the United States under the Suits in Admiralty Act, 46 U.S.C. 741-742, *infra*, pp. 40-42, for additional charter hire for the period from February 19, 1942, to November 17, 1942, for allegedly causing invalidity of the insurance and for the damage sustained in the Japanese attacks as a result of compliance with military orders (R. 5-18). The Government objected to the jurisdiction of the court on the ground that the *Portmar* was not "employed as a merchant vessel" within the proviso of Section 2 of the Suits in Admiralty Act, 46 U.S.C. 742, *infra*, p. 41, and that therefore the suit should have been brought in the Court of Claims

(R. 701). It denied liability for the additional hire on the grounds that the vessel had become a constructive total loss on February 19, 1942, that by the terms of the charter the charterer's obligation to pay hire terminated on actual or constructive loss, and that the owner had elected to treat the charter as terminated after the Japanese attack on February 19, 1942, and also that the voyage had been frustrated (R. 701-2). It denied any liability for invalidation of the insurance and for partial loss from attack, for the former because the insurance had not been invalidated, for the latter on the ground that any losses had not resulted from orders given by the Government as charterer within the meaning of the charter or by any action for which the Government agreed to be liable, but had resulted from war risks assumed by the owner (R. 701). Calmar conceded that the claims against the United States for the charter hire and indemnities were largely alternative to the claim against the war risk underwriters (R. 703).

By stipulation, Calmar's suit against the United States was tried together with its suit against the underwriters, which was brought on November 10, 1944 (R. 45*ff*), and is the subject of No. 303, this Term, *Calmar Steamship Corp.* v. *Scott*. One opinion was written (R. 700-756) but separate decrees were entered (R. 765-768, 777). The District Court held that it had jurisdiction over the claims asserted against the United States because the *Portmar* was "employed as a merchant vessel"

within the meaning of the statute. It stressed operation by the owner with its own crew, the fact that the vessel was not demised to the Government, and her charter for trading. (R. 742-744). "Public service did not alter the merchant character of the vessel * * *" (R. 744). However, inasmuch as the underwriters were held liable, the United States was held responsible only for $238.50 for the victualling of the three supercargoes it required on board, with interest (R. 756, 777).

The underwriters appealed the decision against them and the United States appealed on the jurisdictional point (R. 782-4). In the Court of Appeals, where the appeals proceeded on a single record, it was held that the frustration of the insured voyage released the underwriters and necessitated reversal of the decree against them (R. 792-802); and that because of the nature of its cargo the *Portmar* was not "employed as a merchant vessel," and therefore that the District Court was without jurisdiction to enter any judgment whatsoever against the United States (R. 802-804).

SUMMARY OF ARGUMENT

I

Although the view of the Court of Appeals—that the military character of the cargo on the privately-operated vessel *Portmar* precluded employment as a merchant vessel, in the sense of the Suits in Admiralty Act—was urged by government counsel in the proceedings below and has some support, on further consideration the Government

submits that the view that jurisdiction existed under the Suits in Admiralty Act is better grounded and would prove more beneficial both to the Government and prospective plaintiffs.

A. For vessels operated *by* the United States, the nature of the cargo has determined whether suit lies under the Suits in Admiralty Act (covering ships "employed as a merchant vessel") or the Public Vessels Act (covering a "public vessel of the United States"). The test, originating in *The Western Maid*, 257 U.S. 419, has been applied in subsequent cases, in each of which the United States operated the vessel, and the unsuccessful plaintiff understandably regarded the cargo as the one element favorable to establishing employment as a merchant vessel.

In cases like that at bar, however, where the vessel was privately operated *for* the United States, and the Public Vessels Act would rarely, if ever, be available, we suggest that the cargo test should not be applied. As we show in detail in Points I, B, and C, the Suits in Admiralty Act does not in terms require that the nature of the cargo determine the classification of a vessel operated by a private party for the United States, and the reasons for resolving the ambiguity in the statute in favor of admiralty jurisdiction are persuasive. The frequent uncertainty of maritime litigants as to the Act under which they should proceed and the forum in which they should file suit will be minimized if jurisdiction under the Suits in Admiralty Act is sustained, and this result is con-

sistent with the terms and basic theory of the Act.

B. The main arguments for sustaining Suits in Admiralty Act jurisdiction are the burdensome consequences of denying it. The nature-of-the-cargo test is often far from simple in application. Assuming that the libelant has access to the manifest characterization as military or non-military (in order to forecast the appropriate jurisdictional basis) may require consideration of the kind of goods, their use, the identity of the consignee, and other factors. Moreover, cargo may be mixed or it may be changed during the course of the voyage or the running of the charter. While undergoing repairs, the vessel may be without any cargo at all.

Comparable problems may arise when a vessel operated *by* the United States has to be classified as a "public vessel" or "employed as a merchant vessel", but for that purpose the choice is between complementary sources of jurisdiction in the same federal District Court and plaintiffs may take precautions by filing two suits or pleading in the alternative. Where the choice, as here, is between jurisdiction in the Court of Claims or in the District Court under the Suits in Admiralty Act, that course is rendered impossible by 28 U.S.C. 1500, prohibiting the simultaneous prosecution of a suit in the Court of Claims where the claim against the United States is in litigation in another court. The impossibility of maintaining concurrent suits may then be responsible for unfortunate pitfalls. When the waiver of sovereign immunity is itself unquestioned, an approach

avoiding hardships and binding elections is preferable to one causing needless hardships solely because of the excusable uncertainty of counsel as to the jurisdictional basis for the claim. Cf. *Davis* v. *Department of Labor,* 317 U.S. 249, 254.

Construing the Suits in Admiralty Act to permit suits of this character channels essentially maritime litigation to the District Courts which are familiar with maritime law and which also have flexible procedures to promote the interests of the parties and avoid hardships. Although the Suits in Admiralty and Public Vessels Acts are not phrased in complementary terms, they form and were designed to form an integrated functional system for receiving litigation resulting from the operation of vessels by or for the United States. It would be anomalous, and an indication that the purpose of Congress had failed, if vessels operated *for* the United States, and carrying military or public cargo, are outside the system's joint coverage. Moreover, the immediate purpose of the enactment of the Suits in Admiralty Act—*i.e.* immunization of vessels from the seizure which had been held permissible under the Shipping Act of 1916 (*The Lake Monroe,* 250 U.S. 246)—may well be defeated by the construction that the important class of privately-owned vessels operated for the Government, and carrying military cargo, falls outside the unified system afforded by the two Acts. Even the outside possibility that such vessels may be liable to arrest or seizure strongly argues against the soundness of an interpretation deny-

ing jurisdiction under the Suits in Admiralty Act, and underscores the advantages of having jurisdiction in the District Court.

C. The Suits-in Admiralty Act has been given hospitable scope in the decisions of this Court and, where applicable, has been held to furnish the exclusive remedy on maritime causes of action. As we interpret the course of these decisions, maritime suits against the United States involving merchant vessels are to be concentrated in the federal District Courts to the extent possible, and what constitutes "employment as a merchant vessel" is not to be read too narrowly. The "merchant vessel" proviso to Section 2 of the Suits in Admiralty Act (*infra*, p. 41) is not being stretched beyond recognition when it is construed to cover cargo vessels privately operated for the United States under time charters, regardless of the nature of the cargo; when the United States pays hire to an owner for carrying cargo it appears to be quite accurate to describe the vessel as "employed as a merchant vessel." Nothing we have found in the legislative history detracts from this conclusion.

The *Portmar* herself was a general cargo carrier and had always been in the merchant service. That she retained her general character as a merchant vessel may be said without impropriety and appears to fall within the rules laid down in *Shewan & Sons* v. *United States*, 266 U. S. 108, 113 and *Eastern Transp. Co.* v. *United States*, 272 U. S. 675, 692.

The Western Maid, 257 U. S. 419, and the later

cases on which the Court of Appeals relied are not inconsistent; they involved public vessels operated *by* the United States, rather than ships privately-owned and privately-operated as cargo carriers *for* the United States, and in *The Western Maid*, the Court did not have to construe the Suits in Admiralty Act but Section 9 of the 1916 Act (*infra*, p. 40) which authorized seizure of vessels employed *solely* as merchant vessels. Interference with the performance of vital governmental functions was the possibility that had to be faced in that case, since there was no alternative to seizure under the 1916 Act. This possibility no longer exists where the Suits in Admiralty Act is held applicable, since the Act provides a substitute for seizure. On balance, taking full account of the purposes of the Suits in Admiralty Act and the undesirable consequences of denying jurisdiction, we submit that the Suits in Admiralty Act supports jurisdiction here.

II

Petitioner Calmar presses the liability of the United States provisionally and in the alternative, primarily to deal with the contingency that it may be unable to recover from the underwriters in *Calmar Steamship Corporation* v. *Scott*, No. 303, this Term. The liability of the United States to petitioner is complex and involved. It is reached only if this Court fully adjudicates the claim against the underwriters in the latter's favor and if Suits in Admiralty Act jurisdiction over the instant suit is sustained. Inasmuch as the courts below had no

occasion to consider the questions of government liability extensively, we submit that in the event the liability of the United States is reached, the Court remand the case for further proceedings.

ARGUMENT

I.

The District Court Had Jurisdiction Under the Suits in Admiralty Act

The Court of Appeals held that the Suits in Admiralty Act (*infra*, pp. 40-42) did not apply because the military character of the *Portmar's* cargo on the outward leg of the never-completed round trip voyage showed that the vessel was not "employed as a merchant vessel." This holding was rested on the character of the cargo, although the court recognized that the ship was privately operated by petitioner "for the United States", within the meaning of the Suits in Admiralty Act, with a crew of privately employed merchant seamen, under a voyage charter for the carriage of "lawful merchandise" in "lawful trades", making provision for the issuance of bills of lading (Arts. 2.11, 2.15, R. 28, 30-34).[3]

There has been, for some time, a difference of

[3] In the emergency and war period beginning in 1939-1940, the Government frequently time-chartered privately owned vessels, with private crew. See *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707, 710-11.

If otherwise applicable, the Suits in Admiralty Act admittedly covers vessels time-chartered by the United States, since such vessels are operated "for the United States". *Burkholder* v. *United States*, 60 F. Supp. 700, 703 (E.D. Pa.); *Pineiro* v. *United States*, 65 F. Supp. 191 (N.D. Calif.); *Epstein* v. *United States*, 86 F. Supp. 740 (S.D.N.Y.); *A. H. Bull SS Co.* v. *United States*, 105 F. Supp. 474, 479 (S.D.N.Y.).

opinion within the Department of Justice over whether the Suits in Admiralty Act covers vessels of merchant type, privately operated "for the United States", when they carry military cargo. In the proceedings below, Government counsel, who were of the view that the Act did not apply, urged that position upon the District Court, unsuccessfully, and then with success upon the Court of Appeals. After further consideration, the Government takes the position in this Court that the Act grants jurisdiction to the District Court in these circumstances, but we do so with hesitation because the choice of interpretation is not automatic and there is support for both views. On the whole, however, we conclude that the preferable interpretation is contrary to that of the Court of Appeals; the aids to interpretation point to the broader reading and we believe that such a construction will be in the best interests of both the Government and potential plaintiffs.

A. *The rationale of the Court of Appeals' view.*

The argument in support of the decision below is quite simple. Admittedly, where a vessel is owned or operated *by* the United States, the nature of the cargo is a test of the employment of the vessel and thus of whether suit lies under the Suits in Admiralty Act, or under the Public Vessels Act (if the latter statute is otherwise applicable). In *The Western Maid*, 257 U. S. 419, the grandfather of the rule, the three vessels were all transports owned or bareboat chartered for public purposes by the United States, publicly operated with service

crews, and thus fully qualified as "public vessels." The *Liberty* was commissioned as a Naval dispatch boat and had a Navy crew; the *Carolinian* had been used as an Army transport and had an Army crew. The question as to the *Western Maid* itself was whether a transport owned by the United States and publicly operated by the United States with a Navy crew, loaded with foodstuffs for civilians abroad as a constituent of activity in the First World War, was "employed solely as a merchant vessel", and so could be seized (under Section 9 of the 1916 Shipping Act, *infra*, p. 40, and the ruling in *The Lake Monroe*, 250 U. S. 246) in a suit by the collision victim. The Court held that all the vessels were employed "for public and government purposes", and that, in the case of the *Western Maid*, her cargo of foodstuffs was concerned with the war effort and "had no more to do with ordinary merchandizing than if she had carried a regiment of troops". 257 U. S. at 431-2.

Of the other cases relied on below (R. 803), *Bradey* v. *United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880, held that the *John Morton*, a vessel owned and operated by the United States, with a civilian crew employed by the War Shipping Administration and bound with coal for the Army for Newport News where she was to complete her cargo by loading munitions of war for carriage to the European theatre of war, was employed solely as a public, not as a merchant vessel. The remaining cases also involved govern-

ment-owned or bareboat chartered ships which were publicly operated. *United States* v. *City of New York*, 8 F. 2d 270 (S.D. N.Y.), involved the *Waubesa*, owned by the United States and engaged in the European relief service. In *The Norman Bridge*, 290 Fed. 575, 578 (S.D. N.Y.), modified on other grounds, 13 F. 2d 435 (C.A. 2), the vessel was bareboat chartered to and operated by the United States and was carrying fuel to the British in September 1918 "to enable one of [the] associate belligerents to continue the war," and it was held that, not being "employed solely as a merchant vessel," she could not be subjected to a lien. In each case the decision was predicated on *The Western Maid*, 257 U. S. 419. *United States Grain Corp.* v. *Phillips*, 261 U. S. 106, 111, involving a claim for a commission on gold carried on a Navy destroyer, also followed *The Western Maid*, in declaring that the supply of food to foreign civilians after World War I was a "public function" and not "ordinary merchandizing". In these cases, the operation of the vessel was in the United States, and the unsuccessful party plaintiff looked upon the cargo as the one element possibly favorable to establishing "employment as a merchant vessel". The courts held, however, that the cargo did not bring the ships within the category of public vessels "employed as merchant vessels."

Since the nature of the cargo is clearly a test of "employment as a merchant vessel" in cases in which the vessel is owned or operated *by* the United States, it might of course be said, as the Court of

Appeals held, that the same test should be used where the vessel is operated *for* the United States. Inquiry into the cargo is often made in the first class of cases, and it is not an unusual or novel undertaking. In many instances this test can be readily applied, and where there are difficulties (see *infra*, pp. 19-20), they are not too different from those already encountered in delimiting the employment of Government-owned or Government-operated vessels as solely merchant or as public. In those cases in which its cargo precludes a "merchant vessel" operated *for* the United States from being classified as "employed as a merchant vessel", suit would have to be brought, if there is jurisdiction at all, in the Court of Claims under the Tucker Act or in the District Courts under the Tucker or Tort Claims Act. The Public Vessels Act (*infra*, pp. 42-43) would rarely, if ever, be available since to be "a public vessel of the United States" a ship must ordinarily be operated *by* the United States. See H. Rep. No. 913, 68th Cong., 1st Sess., p. 1.

However, despite the *The Western Maid*, 257 U. S. 419, and its progeny, we suggest that the cargo test should not be extended to the determination of whether a "merchant vessel" operated *for* the United States is "employed as a merchant vessel." The terms of the Suits in Admiralty Act do not require, in and of themselves, that the nature of the cargo be determinative of the classification of the employment of a vessel operated by a private party for the United States, and there are weighty rea-

sons why the cargo test should not be used and why the ambiguity in the statute should be resolved in favor of admiralty jurisdiction. Maritime litigants—who may be owners, seamen, collision victims—are frequently confronted with dilemmas as to the Act under which they are to proceed and the forum in which they are to file suit.[4] In the case of a privately-operated ship carrying cargo for the United States, these difficulties may be minimized, we believe, by sustaining jurisdiction under the Suits in Admiralty Act regardless of the type or nature of the particular cargo. And it is not hard to accept this view since the basic theory, as well as the words of the Act, can quite naturally cover this class of cases.

B. *Grounds for sustaining jurisdiction under the Suits in Admiralty Act.*

1. *Comparative advantages of jurisdiction under the Suits in Admiralty Act.* The main argu-

[4] See H. Rep. No. 2572, 77th Cong., 2d Sess., p. 9 (quoted in *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707, 726): "Present-day operating conditions often make uncertain whether the vessel is a merchant or a public vessel." And see Justice Reed, dissenting, 328 U.S. at 741: "When the War Shipping Administration became the operator of practically the entire American merchant marine, doubts sometimes arose as to whether a particular vessel was a 'merchant' vessel, operated by the United States or not." Cf. *The Florence H*, 248 Fed. 1012 (S.D. N.Y.); Testimony of Judge Charles M. Hough, Hearing before House Committee on the Judiciary, 68th Cong., 1st Sess., on H. R. 9075, May 21, 1924, p. 5; *Responsibility of the United States on Maritime Claims Arising out of the Operation of Government-Owned Vessels*, 39 Yale L. J. 1189, 1192 (June 1930); E. M. Borchard, *What Is a "Merchant Vessel"?* 23 Am. J. Int. Law 391; *The Maritime Liability of the United States*, 100 Univ. Pa. L. Rev. 689, 696 (March 1952).

ments for upholding suit under the Suits in Admiralty Act are a reflection of the burdensome consequences of a denial of jurisdiction, consequences which we shall now consider.

(a). First, the nature-of-the-cargo test may be far from simple in application. The libelant may not have access, particularly in wartime, to the manifest. See *supra*, p. 4. The characterization of the cargo as military or non-military, public and commercial, may be quite complex, since consideration has to be given to the kind of goods, their intended use, the identity and location of the consignee, as well as other factors. Cf. *United States* v. *Powell*, 330 U. S. 238; *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248. Cargo may be mixed in type (i.e., both "military" and "mercantile") and thus raise questions as to which class is dominant.[5] In tort cases these problems, though they exist, would be relatively simple in most cases because the test would probably be the nature of the cargo at the time of the tort.

With respect to contractual claims, however, there would be not only the foregoing problems but also those flowing from changes of cargo in the course of one voyage, or from voyage to voyage.

[5] A shipper whose goods are carried on a vessel operated for the United States and carrying mixed cargo clearly should be able to sue under the Suits in Admiralty Act which, unlike Section 9 of the Act of September 7, 1916, 39 Stat. 730, 46 U.S.C. 808, does not speak in terms of employment *solely* as a merchant vessel. For such a shipper, the vessel is basically carrying cargo for hire and is therefore a merchant vessel. In a collision case it might be necessary to determine which service was paramount. Cf. *The Hamburg*, 298 Fed. 942 (S.D. N.Y.).

during the running of a charter. For instance, a vessel chartered by the Government has frequently carried military or lend-lease cargoes outbound and commercial cargo inbound, and similar change-overs occur as between voyages. In those cases, such questions would arise as to whether one type of cargo was dominant and the other incidental, or what weight is to be given to the connection of the particular cargo with the particular claim.[6] If the particular cargo is important, there will also be problems where a "merchant vessel" is being reconditioned, repaired, or converted, and is therefore not carrying any cargo at all.[7]

This factor of the complexity of determining the nature-of-the-cargo should have considerable weight. See *Thomason* v. *United States*, 184 F. 2d 105, 108 (C.A. 9). Jurisdictional questions that must be resolved at the threshhold should normally be simple and inexpensive to determine, and not such as to require resort to discovery—particularly discovery which may affect questions of security such as disclosure of a vessel's manifest in wartime. If the determination is prohibitive in cost or effort, it hardly lends itself to preliminary determination.

(b). Comparable problems arise, it is true, when a vessel operated *by* the United States has to be classified as "employed as a merchant

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[6] In the instant case, for example, petitioner is claiming for obligations arising after the discharge of the military cargo loaded in Oakland.

[7] Cf. *Eastern SS Lines* v. *United States*, 187 F. 2d 956 (C.A. 1); *Adams* v. *United States*, 281 Fed. 895 (D. Mass.); *The Augusta G. Hilton*, 3 F. 2d 808 (D. N.J.), affirmed, 13 F. 2d 354 (C.A. 3).

vessel" or employed solely as a public vessel. But in those circumstances the choice is ordinarily between two complementary sources of jurisdiction of the same federal District Court—the Public Vessels Act or the Suits in Admiralty Act—and the difficulties of choosing the wrong forum are diminished to possible differences in venue. Here, the classification probably entails a difference in courts—the District Court or the Court of Claims—and the burdens of choice are that much greater.

For one thing, plaintiffs cannot cautiously hedge by maintaining two suits at the same time or invoking jurisdiction in the alternative, as they may when the choice is between the Suits in Admiralty and the Public Vessels Acts. For litigants can no longer protect their rights by suing under the the Tucker Act in the Court of Claims and under the Suits in Admiralty Act in the District Court, now that 28 U.S.C. 1500[8] prohibits the simultaneous prosecution of a suit in the Court of Claims where the claim against the United States is in litigation in another court. Plaintiffs may, therefore, have to proceed at their peril, sometimes, as here, without prior knowledge of the nature of the cargo. Since no general provision

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[8] "The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

See Brief for the United States in *De La Rama SS Co.* v. *United States*, No. 368, this Term, pp. 23-24.

for the transfer of cases between these courts exists[9], and concurrent suits, as prudence would otherwise dictate, is a refuge specifically denied by 28 U.S.C. 1500, unfortunate pitfalls are a probable concomitant of apportioning jurisdiction on the basis of cargo-type to the Court of Claims, which has no jurisdiction under the Suits in Admiralty Act,[10] and where suits must be dismissed unless pleadings negative employment as a merchant vessel. *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 359.

This inability to take precautions is worthy of serious consideration along with the difficulty of determining the character of a vessel's employment by its cargo. Whatever the abstract attraction of the competing jurisdictional solutions may be, when, as here, the waiver of sovereign immunity is itself beyond controversy, a pragmatic approach avoiding hardships, inconveniences, binding elections to sue in the wrong forum, and the expense of an unrewarding inquiry into jurisdictional facts, is preferable to a solution that may inflict needless hardships solely on account of the excusable misapprehensions of counsel as to the jurisdictional

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[9] *De La Rama SS Co.* v. *United States*, 198 F. 2d 182 (C.A. 2), now on writ of certiorari, No. 368, this Term; *Walsh* v. *United States*, 105 F. Supp. 816 (E.D. Pa.); *Bare* v. *United States*, 107 F. Supp. 551 (M.D. Pa.). Cf. Section 37 of the Act of June 25, 1948, 62 Stat. 869, 992, providing for such transfer under the War Contract Hardship Claims Act; *American Const. Co.* v. *United States*, 107 F. Supp. 858, 862 (C. Cls.).

[10] *Sanday & Co.* v. *United States*, 76 C. Cls. 370.

basis for the claim. Cf. *Davis* v. *Department of Labor*, 317 U.S. 249, 254.[11]

Moreover, the difference in the statutes of limitations under the Tucker Act (six years, 28 U.S.C. 2501) and the Suits in Admiralty Act (two years, 46 U.S.C. 745) brings forth other reasons for centering actions under the latter statute where possible. Plaintiffs with similar or nearly identical causes of action would have different periods in which to sue, a result to be avoided. See *Thomason* v. *United States*, 184 F. 2d 105, 108 (C.A. 9); *Federal Sugar Refining Co.* v. *United States*, 30 F. 2d 254 (C.A. 2), reversed on other grounds, 280 U.S. 320; *Angfartygsaktiebolaget Tirfing* v. *United States*, 70 C. Cls. 251, 260. Also, a litigant may be encouraged to proceed in the forum where he has six years, and the chances are therefore multiplied that he will discover that in addition to the delay and expenses of litigation "his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere." See *Davis* v. *Department of Labor*, 317 U.S. 249, 254.[12]

(c). On the other hand, substantial advantages spring from construing the Suits in Admiralty Act to permit District Court actions in all admiralty

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[11] The modern tendency is to relieve parties of perilous elections when they may not be fully advised and are in a genuine quandary as to how to proceed.

[12] Shorter periods of limitation reduce the difficulties of locating witnesses and have the effect of assuring trial on fresher oral testimony rather than on depositions taken years later. The libel in this case was filed on February 11, 1944 (R. 1).

cases such as this. That solution channels essentially maritime litigation to the District Courts, where admiralty and maritime cases are daily tried; where the jurisdictional bases may be pleaded in the alternative;[13] where transfers from one side of the court to the other are possible, as are transfers from one district to another; where the suit may be maintained alternatively under the Suits in Admiralty Act, the Public Vessels Act, the Tort Claims Act, or the Tucker Act (on claims not exceeding $10,000), thus mitigating the rigors of exclusive jurisdiction; and where specialization and expertise in the body of maritime law may be drawn upon[14] and uniformity in the rules of decision and procedure in maritime matters may be achieved.[15] It is also frequently advantageous to have closely related or interdependent private litigation, such as that between Calmar and its underwriters in No. 303, this Term, consolidated for trial with a suit against the United States, so

[13] Cf. *Ryan Stevedoring Co.* v. *United States*, 175 F. 2d 490 (C.A. 2), certiorari denied, 338 U.S. 899; *Conners Marine Co.* v. *Petterson Lighterage & Towing Corp.*, 60 F. Supp. 960, 961 (S.D. N.Y.).

[14] The bulk of the law maritime has been evolved in litigation to which the United States was not a party.

[15] See *U. S. Shipping Bd. Emergency Fleet Corp.* v. *Rosenberg Bros.*, 276 U.S. 202, 213; *Johnson* v. *Fleet Corp.*, 280 U.S. 320, 327; *Matson Navigation Co.* v. *United States*, 284 U.S. 353; *Thomason* v. *United States*, 184 F. 2d 105 (C.A. 9).

The usual charter party is maritime. A shipowner who operates a vessel for the Government under charter has a claim within the admiralty jurisdiction. *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 358; *A. H. Bull SS Co.* v. *United States*, 105 F. Supp. 474 (S.D. N.Y.). Judge Learned Hand's opinion in the District Court, *N. S. Byornes & Son* v. *United States*, 298 Fed. 123 (S.D. N.Y.), that an owner could not sue under the Suits in Admiralty Act has been rejected.

as to achieve an equitable, consistent and dispositive result, tying up all loose ends, concluding all parties in interest, and fully adjusting their rights and liabilities. This advantage would be unavailable in the Court of Claims.

The District Court is, of course, the forum for both Suits in Admiralty Act and Public Vessels Act suits, and that fact provides another key to interpretation of these statutes. In view of the widespread awareness that, read together, the Suits in Admiralty Act and the Public Vessels Act, though not phrased in complementary terms, nonetheless form and were intended to form an integrated and entire system subjecting the United States to admiralty suits—providing two touching or overlapping nets for the reception and accommodation of litigation resulting from the operation of vessels by or for the United States[16]—it would be anomalous to find a major failure of coverage, and the United States less liable to suit in the admiralty courts when the vessels operated for it are carrying military or public cargo than when they carry commercial cargo.[17] It is unnecessary to

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[16] *State of Maine* v. *United States*, 134 F. 2d 574 (C.A. 1), certiorari denied, 319 U.S. 772; *United States* v. *Caffey*, 141 F. 2d 69 (C.A. 2); *Mejia* v. *United States*, 152 F. 2d 686 (C.A. 5), certiorari denied, 328 U.S. 862; *Thomason* v. *United States*, 184 F. 2d 105 (C.A. 9); *Olavarria & Co.* v. *United States*, 56 F. Supp. 758, 763 (S.D. Ala.); cf. *Canadian Aviator Ltd.* v. *United States*, 324 U.S. 215, 220-221; 59 Cong. Rec. 1680.

[17] After the decision of the Court of Appeals herein, the owner of a vessel chartered by the Maritime Commission for national defense purposes, in January 1942, for a round voyage to Red Sea ports was allowed to sue under the Suits in Admiralty Act in *A. H. Bull SS Co.* v. *United States*, 105 F. Supp. 474 (S.D. N.Y.) because she was loaded with a cargo of gen-

adopt the approach that between them the Suits in Admiralty Act and the Public Vessels Act cover the whole ground[18], so that there is no middle ground, in order to suggest the improbability that the important category of military-cargo-carrying merchant vessels operated for the United States could have gone unprovided for these many years (except in the Court of Claims on contractual claims only), and that until the Tort Claims Act in 1946 the only relief against the United States for a tort by such a "merchant vessel" chartered by the Government for general purposes and privately operated with merchant seamen would have been by way of an appeal to Congress for a private bill (cf. *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 550, 552), or that, even today, because of the limited coverage of the Tort Claims Act, a private bill is the only remedy for a collision in a foreign country. See 28 U.S.C. 2680(k).

(d). There is another factor, of great importance to the United States, which argues for inclusion of cases like this within the Suits in Admiralty Act. One immediate purpose for the enactment of that Act was immunization of vessels from the seizure

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eral merchandise. Regarding the character of the particular cargo carried by privately owned and operated merchant vessels as decisive of admiralty jurisdiction yields such peculiar results.

[18] The Public Vessels Act may not cover all contract claims. Compare *Thomason* v. *United States*, 184 F. 2d 105 (C.A. 9) with *Eastern SS Lines* v. *United States*, 187 F. 2d 956 (C.A. 1); cf. *American Stevedores* v. *Porello*, 330 U.S. 446. Thus, the dovetailing may be imperfect if the Public Vessels Act fails to cover the range of claims comprehended within the Suits in Admiralty Act.

which had been held (*The Lake Monroe*, 250 U.S. 246) permissible under the Shipping Act of 1916 (*infra*, p. 40). *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 219; *Clyde-Mallory Lines* v. *Eglantine*, 317 U.S. 395, 397; *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575, 579; *Blamberg Bros.* v. *United States*, 260 U.S. 452, 458. Another impelling purpose was the extension of immunity from arrest and seizure to privately owned and operated vessels which were carrying cargo "for the United States." These purposes may well be defeated by the construction that a large gap in the system exists and that the important category of privately owned vessels, privately operated for the Government but carrying military cargo, may fall outside the system afforded by the two Acts and, not constituting public vessels (because not publicly operated), will become liable to arrest or seizure. Interference with vessels operated for the United States and carrying public cargo would clearly be more embarrassing to government operations than interference with such vessels carrying commercial cargo.

Other things being equal, a construction that does not impute to Congress a failure of purpose should be put upon the Suits in Admiralty Act, and any hiatus between the continuity of coverage of the Suits in Admiralty Act and Public Vessels Act, which would embarrass the dispatch of government business, should be held avoided. The statutory immunity from seizure conferred by Section 1 of the Suits in Admiralty Act (*infra*, pp. 40-41) is

probably limited to those vessels which are "employed as merchant vessels" as specified in Section 2 (*infra*, p. 41)—in view of the legislative history showing the limited objective of the Act (see Pet. Br., pp. 19-23), of the statutory arrangement with Section 2 referring back to Section 1 (*Burkholder v. United States*, 60 F. Supp. 700, 702 (E.D. Pa.) and see the opinion below, R. 803),[19] and of the improbability that Congress intended to immunize vessels from seizure under Section 1 without affording a compensating remedy for damages under Section 2.[20]

Of course, the force of this immunity-from-seizure argument should not be exaggerated. Seizure may be only an outside possibility, since the liability to seizure under the 1916 Act, *infra*, p. 40, enforcement of which was the immediate occasion for the Suits in Admiralty Act, only extended to vessels purchased, chartered, or leased from the Maritime Commission (now Maritime Administration); this would seem to exclude many, if not most, vessels operated or chartered by the United States (See Austin Tappan Wright, *Government Ownership and the Maritime Lien*, 7 Calif. L. Rev. 242, 258 (May 1919)), and it has been doubted that a vessel in the service of the sovereign on a time char-

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[19] Note particularly the declaration in Section 1 that the immunity from arrest or seizure is granted "in view of the provision herein made [in Section 2] for a libel in personam."

[20] If Section 1 is read independently of Section 2, privately operated vessels such as *Portmar* would be immune from arrest or seizure since they are "operated * * * for the United States," but a claimant could not sue under Section 2 because (under the decision below) the vessel was not "employed as a merchant vessel."

ter may be seized under the non-statutory maritime law. (*The Crimdon*, 35 T.L.R. 81, 82 (Prob., Divorce and Admiralty Division)). Nevertheless, the possibility that the purpose of immunizing such vessels may fail and that privately owned and privately operated merchant vessels chartered by the United States for general purposes may be seized, because their cargo consists of munitions of war or grain for distressed areas, instead of commercial cargo, puts in question the soundness of the interpretation of the court below.

In sum, the advantages all lie with jurisdiction in the District Court under the Suits in Admiralty Act and not with jurisdiction divided, somewhat precariously, between the District Court and the Court of Claims. It remains to show, more particularly, that the basic theory and the terms of the Act allow of this reading.

2. *General theory of the Suits in Admiralty Act.*

(a). This Court has given hospitable scope to the Suits in Admiralty Act. In *Shewan & Sons v. United States*, 266 U. S. 108, the Act was held applicable to a vessel which was laid-up but had previously been employed as a merchant ship. The Act was also held to give jurisdiction over a suit for a collision with a sunken wreck which had been employed by the Government as a merchant vessel before its loss. *Eastern Transportation Co. v. United States*, 272 U. S. 675. The same case held that the Act was not limited to cases where there would have been *in rem* liability but "also had a

wider effect and created a broader personal obligation of the United States, as the owner of an offending vessel, like that of a private owner, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem*" (276 U. S. at 212). *United States Shipping Board Emergency Fleet Corp* v. *Rosenberg Brothers & Co.*, 276 U. S. 202, 214, held that the Act furnished the "exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels," and therefore that no suit could be maintained outside of the Act against a suable Government corporation. *Johnson* v. *U. S. Shipping Board Emergency Fleet Corp.*, 280 U. S. 320, 325-327, extended this ruling to preclude all suits, under the Tucker Act or the common law, in federal or state courts, on maritime causes of action which are within the Suits in Admiralty Act. And in *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 356-357, 359, the Court confirmed the exclusiveness of the Act and rejected a maritime suit brought in the Court of Claims.

We infer from this line of cases that (a) maritime suits against the United States involving merchant vessels are to be entered, if possible, in the federal District Courts, and (b) the term "employed as a merchant vessel" is not to be read in a cramped or too literal style.

(b). On the basis of these twin fundamental principles, as well as of the comparative advantages of jurisdiction under the Act (*supra*, pp. 18-29), it is not hard to interpret the proviso to Section 2 of

the Suits in Admiralty Act as covering cargo vessels privately operated *for* the United States, under time or voyage charters, regardless of the nature of the cargo. The owner earns hire from the United States for carrying the Government's cargo, and his vessel can therefore be easily said to be "employed as a merchant vessel." Certainly, it is not a public vessel since it is not operated by the United States (*supra*, p. 17), and it would be difficult to classify the ship at all, if one were to reject the idea that it is "employed as a merchant vessel." In ordinary speech, as well as in maritime parlance, a ship carrying cargo for hire is being used as a merchant vessel.

We know of nothing in the Act's legislative history contradicting this conclusion. In explaining the change in S. 3076, 66th Cong., 2d Sess., whereby the words "provided that such vessel is employed or intended to be employed in the carriage of cargoes or passengers for hire" were omitted and the words "provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation" were substituted, the Conference Report (H. Rep. No. 669, 66th Cong., 2d Sess., p. 5; reprinted in 59 Cong. Rec. 3631 (Feb. 28, 1920)) said only that "The effect of this change is to exclude from the scope of the bill certain public vessels not employed as merchant vessels, but that occasionally carry persons and property for hire, and to make certain that tugboats employed as auxiliaries to the merchant fleet are made subject to the proposed act." This indicates that Congress was concerned with certain Government-owned or Gov-

ernment-operated vessels which might sometimes carry cargo for hire and still not be employed as merchant vessels. But there is no suggestion that privately-owned and privately-operated cargo-carrying ships would be regarded as employed as other than merchant ships.

(c). There is a somewhat narrower basis for sustaining jurisdiction here, *viz.*, the general character of the *Portmar* as a "merchant vessel." The *Portmar* was a general cargo carrier built in 1919 (R. 580, 703); she was included in the official list of *Merchant Vessels of the United States;* (see fn. 1, *supra,* p. 3); she was in merchant service when she was chartered by the Government, before entry into the war, under P.L. 101, 77th Cong., 55 Stat. 242, 50 U.S.C. App. 1273. Finally, her government charter was for trading, and the ship was to be manned by merchant seamen and operated by Calmar; and she was so operated at all times during the voyage in question. The fact is that she was employed as and retained her general character as a merchant vessel, notwithstanding that the Government as charterer may have availed itself of its option to ship military instead of commercial cargo.

In this view, employment as a merchant vessel looks to general character and permits the parties to dispense with over-particularized and nice inquiries into the details of operations at a given time.[21] To regard only the nature of the particular

[21] "If the vessel is earning her living in the merchant service, she is so employed within the meaning of this statute." *Adams v. United States,* 281 Fed. 895, 896 (D. Mass.).

cargo on the particular voyage as having any bearing on the jurisdictional status of the vessel is surely to abandon general guides that this Court has laid down under the Suits in Admiralty Act. "The words of the proviso [to Section 2] may reasonably and more libefally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as such." *Shewan & Sons* v. *United States*, 266 U.S. 108, 113; see also *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 692. The employment and jurisdictional status of a vessel and the character of a continuous operation need not change overnight as cargo is loaded and unloaded, multiplying the inquiries and distinctions when the general employment remains unchanged.[22] Cf. *The Nishmaha*, 263 Fed. 959. (D. Ore.) (which may perhaps have been overruled on its specific facts by *The Western Maid*, 257 U.S. 419). Thus, in *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 692, the wreck case (*supra*, p. 29), this Court held that "What the statute means by saying 'employed as a merchant vessel', is that the vessel shall belong to that class as distinguished from one employed in the governmental service—not necessarily that it shall be actively thus employed at the time of the collision." See also *Adams* v. *United States*, 101 F. Supp. 956, 959 (D. Mass.).[23] This view is con-

[22] But see, as to the corresponding but unrelated problem in war risk insurance, *Larrinaga Steamship Co., Ltd.* v. *The King*, [1945] A.C. 246, 258 (H.L.).

[23] *Eastern SS Lines* v. *United States*, 187 F. 2d 956 (C.A. 1), affirming 91 F. Supp. 214 (D. Mass), is not opposed. There,

firmed by the difference in wording between the Suits in Admiralty Act and the Shipping Act of 1916 (*infra*, pp. 40-41). Under the latter, exclusiveness was specifically required ("solely as merchant vessels") and any blend or admixture contradicted employment solely as a merchant vessel. The Suits in Admiralty Act omits this requirement of absolute exclusiveness.

(d). *The Western Maid*, 257 U. S. 419, and the later cases on which the Court of Appeals relied (*supra*, pp. 14-16), do not bar these conclusions. In the first place, as noted above (p. 16), these decisions all involved public vessels, *i.e.*, vessels operated by the United States, and not ships privately owned and privately operated as cargo carriers for the United States. Moreover, *The Western Maid* construed the language of Section 9 of the 1916 Act, which had been interpreted to authorize seizure of vessels "employed solely as merchant vessels" (*The Lake Monroe*, 250 U. S. 246), and

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the United States agreed to make repairs, or pay for them, after use of the *Acadia* by the Army for a troop transport under a requisition charter. It was held that the court had no Suits in Admiralty Act jurisdiction over the owner's claim for reconditioning, for although the vessel was built as a merchant cargo vessel, the charter recited it was to make the *Acadia* available to the Army or Navy Departments for military use as a public vessel, and she was in fact used as a transport and hospital ship and then to carry dependents of service persons from the United States and troops to the United States. In holding that the claim did not arise out of employment in the merchant service, and that redelivery to the Maritime Commission for a short while pending redelivery to the owner did not cause a reversion to the former status, the court properly observed that the liability was an incident of employment as a public, not a merchant, vessel. The charter specified military use and she was so used.

the Court was doubtless concerned with the possibility that seizure or arrest might interfere with the public service or restrain or retard aid to distressed foreign areas following World War I (see (1952) 100 Univ. Pa. L. Rev. 689, 696). The possibility of arresting vessels operated for the United States, if employed as merchant ships is, of course, foreclosed by Section 1 of the Suits in Admiralty Act, and there is therefore no comparable need to read the Suits in Admiralty Act term—"employed as a merchant vessel"—narrowly.

On balance, we believe that it is better to determine the present issue by taking full account of the major purposes of the Suits in Admiralty Act and the consequences of denying jurisdiction under it, rather than by giving the widest possible reading, as did the court below, to the expressions in *The Western Maid, supra.*[24] It is submitted that the Suits in Admiralty Act, reasonably interpreted, and giving proper respect to the literal wording of the "employed as a merchant vessel" proviso to Section 2, is consistent with jurisdiction here, and that such an interpretation best comports with the "central purpose of the Act" (see *Johansen* v.

[24] It is permissible to take account of different consequences in construing the same or similar words: *Brooks* v. *United States*, 337 U.S. 49, 52-53; *United States* v. *Fisher*, 2 Cr. 358, 386, 390; cf. Mr. Justice Holmes, dissenting in *Kepner* v. *United States*, 195 U.S. 100, 134. And the dominant principle is always to consider the particular purpose and context of the words chosen by Congress. *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172, 190; *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 258; *United States* v. *Raynor*, 302 U.S. 540, 547-548; *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534, 542; *Securities & Exchange Commission* v. *Joiner Corp.*, 320 U.S. 344, 350-351.

United States 343 U. S. 427, 431), best effectuates congressional policies, and best serves the interests of all litigants.

II

Petitioner's Other Questions Are Not Ready for Adjudication

Liability of the United States to the petitioner is sought provisionally (R. 779-781)[25] and in the alternative (R. 88), contingent upon the owner's inability to recover from the underwriters, who are the respondents in *Calmar Steamship Corporation* v. *Scott*, No. 303, this Term.[26] Furthermore, in addition to that element of contingency, the liability of the United States does not follow automatically from the non-liability of the underwriters but must be established independently on the basis of the obligations the Government assumed in the voyage charter. The question of the liability of the United States to petitioner is somewhat complex and involved, and is reached only (1) if the underwriters are not liable, and are found not to be liable by this Court, (2) if suit under the Suits in Admiralty Act may be maintained against the United States, and (3) as to the claim for hire, if the vessel was not a constructive loss[27] (R. 88).

[25] For charter hire until November 17, 1952 and indemnity. Calmar only appealed provisionally.

[26] The United States paid the premiums and, as in *Larrinaga Steamship Co., Ltd.*, v. *The King*, [1945] A.C. 246, 261-263 (H.L.), was both the charterer and the source from which military orders derived. In the *Larrinaga* case the charterer was relieved from responsibility for naval orders.

[27] The United States interposed four affirmative defenses to the claim for hire (R. 41-42).

The courts below had no occasion to consider the questions fully; the District Court because it held the underwriters liable [28] and the Court of Appeals because it found against jurisdiction under the Suits in Admiralty Act.

For the foregoing reasons, as suggested in the Memorandum for the United States on the petition for certiorari herein, in the event that jurisdiction is sustained and the liability of the United States is reached, this Court should not be asked to act as a court of first instance to consider the questions reserved in the petition for certiorari. They are dependent not only upon interpretation of the charter but upon contested issues of first impression, [29] upon controverted facts, [30] and examination and evaluation of the evidence. [31] This Court should remand the case for further proceedings, including the introduction of further evidence, on the correct jurisdictional premises. Cf. *Marconi Wireless Co.* v. *Simon*, 246 U. S. 46, 57; *Rosenthal* v. *N. Y.*

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[28] The district court did enter judgment against the United States for a small sum ($238.50) for victualling the supercargoes (R. 20, 152-153, 756) but since it found the underwriters liable and that the vessel was a constructive total loss, it denied the claim for hire (R. 756). It further held that the *Portmar* did not sustain any loss or damage which would render the United States liable under the charter (R. 756).

[29] See *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 237.

[30] See *Stringfellow* v. *Atl. Coast Line*, 290 U.S. 322, 326; *Gerdes* v. *Lustgarten*, 266 U.S. 321, 327; cf. *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469, 474; *Standard Oil Co.* v. *United States*, 340 U.S. 54, 59.

[31] See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 214; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 143-144; *Manufacturers' Co.* v. *McKey*, 294 U.S. 442, 453-454.

Life Ins. Co., 304 U. S. 263; *Cities Service Co.* v. *Dunlap*, 308 U. S. 208, 211; *American Stevedores* v. *Porello*, 330 U. S. 446, 457-8; *Brooks* v. *United States*, 337 U. S. 49, 54; *Communications Comm'n.* v. *WJR*, 337 U. S. 265, 285. [32]

We note merely that the theory that the United States must be liable if the underwriters prevail in *Calmar Steamship Corporation* v. *Scott*, No. 303, is without merit. The Government made no such undertaking and none may reasonably be implied. The Government as charterer only agreed to pay for insurance (Art. 2.17, R. 35), not to stand liable as insurer. The liability of an insurer may not be interpolated into the charter by any tortured construction of the charterer's agreement to pay for war risk insurance. [33]

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[32] The contention (Pet. Br. 2, 43-45) that the United States is liable to petitioner (even though No. 303 is reversed and the underwriters held liable) for the benefit of the underwriters is plainly insubstantial, but that contention may also be remitted to the courts below.

[33] Art. 2.16 specifically provides against liability on the part of the charterer for acts of war or of public enemies, disproving liability as insurer (R. 34).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the cause should be remanded to the District Court with directions to consider the claims of the libelant under the charter in accordance with the Suits in Admiralty Act, taking into consideration the forthcoming decision of this Court in *Calmar Steamship Corporation* v. *Scott*, No. 303, this Term.

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JANUARY, 1953.

APPENDIX

1. Section 9 of the Shipping Act of September 7, 1916, 39 Stat. 730, 731, 46 U.S.C. 808, provides in pertinent part as follows:

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. * * *

2. The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741, *et seq.* provides in pertinent part as follows (as it appears in 46 U. S. Code):

> § 741 [Sec. 1 of the Act]. *Exemption of United States vessels and cargoes from arrest or seizure*
>
> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chap-

ter shall not apply to the Panama Railroad Company. [Act of Mar. 9, 1920, c. 95, § 1, 41 Stat. 525.]

§ 742 [Sec. 2 of the Act]. *Libel in personam.*

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and

effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. [Act of Mar. 9, 1920, c. 95, § 2, 41 Stat. 525.]

3. The Public Vessels Act of March 3, 1925, 43 Stat. 1112, 46 U.S.C. 781 *et seq.* provides in pertinent part as follows (as it appears in 46 U.S. Code):

§ 781. *Libel in admiralty against or impleader of United States*

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920. [Act of Mar. 3, 1925, c. 428, § 1, 43 Stat. 112.]

§ 782. *Venue of suit; application of provisions of chapter 20* [*i.e.*, the *Suits in Admiralty Act*]

Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the

transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [*i.e.*, the Suits in Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest. [Act of Mar. 3, 1925, c. 428, § 2, 43 Stat. 1112.]

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